Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

LLOYD BRYANT, DESMOND BUTLER, DORIS BYRD, REGINALD CARPENTER, THEODORE DAVIS, MARY GRAYER, JUDGE HARDY, LARRY HARGROVE, JUANA HARPER, EDDIE HICKS, PRENTISS JACKSON, WILLIAM JAMES, VANCE KIMBER, BARRY MASTIN, MAURICE McCASTER, PAUL MIAL, REYES MORAN, CHERIFF MORGAN, YVONNE ROBINSON, HOLLY ROBINSON, CISCO ROWLAND, KEVIN RUSSELL, BRENDA SHEAD, EUGENE SHEPHERD, DIANE THOMPSON, CALVIN TYLER, EARL WASHINGTON, GERTRUDE WEST, AND WANDA WOODS,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603

(312) 427-3200
Attorney for Petitioners

95pp

QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964, as amended, require empirical validation when an employer seeks to show, under 42 U.S.C. §2000e-2(k)(1)(A), that an employment test which has a gross disparate impact is "job related for the position in question?"

2. May a test used for promotion to police lieutenant be shown to be a "reasonable measure of job performance" without empirical evidence that sergeants who score higher on the test will perform better as lieutenants than those who received lower scores?

3. Does Title VII of the Civil Rights Act of 1964, as amended, permit an employer to use a promotional test that has a significant disparate impact on minorities when the employer concedes that, as a group, minorities are equally qualified for promotion as non-minorities?

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PETITION FOR WRIT OF CERTIORARI

Petitioners[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 14, 2000.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-18) is reported at 200 F.3d 1092. The opinions of the district court are reported at 917 F.Supp. 577 (N.D.Ill. 1996), (App. 21-38, (preliminary injunction), 8 F.Supp.2d 1095 (N.D.Ill. 1998), (decision on the merits, App. 39-74), and 19 F.Supp.2d 890 (N.D.Ill. 1998), (App. 75-80, ruling on remedy).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 17) was entered on January 14, 2000. Rehearing was denied on February 16, 2000. (App. 18.)

STATUTORY PROVISION INVOLVED

This case involves 42 U.S.C. §2000e-2(k)(1)(A), which provides as follows:

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1. Petitioner are Lloyd Bryant, Desmond Butler, Doris Byrd, Reginald Carpenter, Theodore Davis, Mary Grayer, Judge Hardy, Larry Hargrove, Juana Harper, Eddie Hicks, Prentiss Jackson, William James, Vance Kimber, Barry Mastin, Maurice McCaster, Paul Mial, Reyes Moran, Cheriff Morgan, Yvonne Robinson, Holly Robinson, Cisco Rowland, Kevin Russell, Brenda Shead, Eugene Shepherd, Diane Thompson, Calvin Tyler, Earl Washington, Gertrude West, and Wanda Woods.

Sec. 2000e-2. Unlawful employment practices
***

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if —

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

STATEMENT

In 1994, respondent City of Chicago administered a test for its police sergeants who sought a promotion to lieutenant. Respondent planned to promote those who attained the 108 highest scores.

Thirty-one percent of the 765 sergeants who completed the test were minorities.[2] Minorities made up less than six percent of those with the 108 highest scores.[3]

To minimize the disparate impact of the test, Chicago sought to supplement test score promotions with promotions

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2. Of the 765 sergeants who took the test, 184 were African-American and 55 were Hispanic,

3. Five African-American and 1 Hispanic sergeants were among the top 108.

based on past performance. Chicago selected thirteen police sergeants for merit promotions to complement 54 test score promotions; eight of the thirteen were minorities. The state courts, though, prohibited the merit promotions as contrary to state law. *McArdle v. Rodriguez*, 277 Ill.App.3d 365, 659 N.E.2d 1356 (1995). Chicago proceeded to make the test score promotions an advanced 51 white sergeants and 3 minority sergeants to lieutenant. As a result of these promotions, the minority representation in the lieutenant workforce dropped from about 23% to 19%.

Petitioners, a group of African-American and Hispanic Chicago police sergeants, filed suit in the district court to challenge the test score promotions. In a claim brought under Title VII of the Civil Rights Act of 1964, as amended, petitioners contended that the statistical evidence made out a *prima facie* case of disparate impact discrimination and asserted that Chicago would be unable to meet its burden of showing job relatedness under 42 U.S.C. §2000e-2(k)(1)(A)(i). Petitioners also asserted that merit promotions were an equally valid, less discriminatory alternative to test score promotions.

Shortly after Chicago announced its intent to make a second round of promotions from the test score list, petitioners requested the district court to issue a preliminary injunction to block further promotions. About 94% of these additional promotions were slated for white officers and the planned promotions would decrease the percentage of minority police lieutenants to slightly less than 14%.

After a hearing, the district court accepted Chicago's concession that the statistical evidence established a disparate impact. (App. 32.) The district court found that Chicago "does not have any empirical evidence to demonstrate that sergeants who score higher on the examination will perform better as lieutenants than those who receive lower scores," (App. 25), but refused to prohibit further promotions from the list, holding that petitioners could not establish

irreparable harm because, if petitioners prevailed on the merits, the court could order additional promotions. (App. 30.)

Trial on the merits focused on the job relatedness of the three sub-tests that made up the examination and on the opinion testimony on which Chicago had relied to use the composite test score for rank order selection. Petitioners challenged the opinion testimony as lacking empirical support. The district court acknowledged that Chicago had conceded that, as a group, minorities were equally qualified as non-minorities for promotion (App. 37), but rejected petitioner's legal arguments, concluding that each of the sub-tests was job-related and that use of the scores for rank order selection "is approved by the EEOC Guidelines and industry standards in connection with a content valid test." (App. 58.) The trial court concluded, however, that merit promotions were an equally valid, less discriminatory alternative (App. 59-62) and ordered the City to promote the 13 sergeants who had originally been selected for merit promotion. (App. 66.) The district court declined to order any additional merit promotions because "[t]o attempt now to identify sergeants who were deserving of merit promotion three years ago would be conjectural and overly subjective." (App. 68.)

On appeal, petitioners challenged the legal standard that the district court had applied in upholding use of test scores for rank order selection. Petitioners argued that when test scores have a disparate impact and are used for rank order selection, empirical evidence, rather than opinion testimony, is required to meet the standard of of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975), i.e., that test scores are "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." Petitioners also complained about the refusal of the district court to order additional promotions.

The Seventh Circuit rejected petitioner's arguments, holding that empirical data was not required because "[i]t

would be unrealistic to require more than a reasonable measure of job performance'' (App. 9-10.)

REASONS FOR GRANTING THE WRIT

This case raises an important and recurring question that arises whenever employment decisions are made on the basis of test scores that have a disparate impact on minorities.

Since the Court last visited this issue in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court of Appeals have reached conflicting answers to the question of whether Title VII requires empirical evidence of a relationship between test scores and job performance. This inter-circuit conflict involves the core protections enacted by Congress in 42 U.S.C. § 2000e-2(k)(1)(A)(i) as part of the Civil Rights Act of 1991 and should be resolved by this Court.

Employment tests have a well documented discriminatory impact. ''In the psychometric literature . . . it has become a virtual truism that the average performance of racial and ethnic groups . . . differs, sometimes by as much as a standard deviation.''[4] *See generally* Jencks, C., & Phillips, M., *The Black-White Test Score Gap* (1998).

The promotion test at issue in this case reduced the percentage of minority Chicago police lieutenants from 23% of the workforce to about 14%. (App. 26.) Although 31% of those who took the test were African-American and Hispanic, minorities made up about 6% of those promoted. (App. 39.) The poor showing of minorities on the test does not reflect differences in job performance: when Chicago selected 13

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4. Helms, *Why Is There No Study of Cultural Equivalence in Standardized Cognitive Ability Testing?* 47 Amer. Psychologist 1083 (1992).

sergeants for promotion on the basis of past performance, without regard to test scores, the group consisted of five white sergeants and eight minority sergeants — near perfect parity with minority representation in the sergeant workforce. (App. 65.)

Police administrators agree that when a police department fails to reflect the racial composition of the community it serves, it will be viewed as an "army of occupation" and will have difficulty securing citizen cooperation in reporting and solving crimes. This view was endorsed in this case by the Superintendent of the Chicago Police Department.

Petitioners argued below that when an employer seeks to use a discriminatory test, Title VII requires the employer to present empirical evidence of a relationship between test scores and job performance. Petitioners argued that without such empirical evidence, the employer cannot meet its burden of showing that scores on the test are "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975), quoting 29 CFR §1607.4 (c).

Chicago did not present any empirical evidence in this case and defended its test on the theory, accepted by the Seventh Circuit, that Title VII does not require empirical evidence relating test scores to actual job performance.

Aside from the Seventh Circuit, the courts of appeals that have considered this issue have rejected Chicago's legal theory. The rule outside of the Seventh Circuit is that an employer who seeks to make promotions by using test scores that have a disparate impact on minorities must present "evidence showing that those with a higher test score do better on the job than those with a lower test score." *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812, 822 (5th Cir. 1980), opinion following remand, 31 F.3d 1548. This

showing must include "empirical evidence of an association between levels of performance on the multiple choice examination and on the job." *Firefighters Institute v. City of St. Louis,* 616 F.2d 350, 359 (8th Cir. 1980). When, as here, test scores are used for rank ordering, the employer must present evidence that a "one- or two-point differences in scores reflect differences in job performance." *Guardians Association v. Civil Service Commission,* 630 F.2d 79, 100-01 (2d Cir. 1980). With the exception of the Seventh Circuit, the uniform view is that a "discriminatory cutoff score is impermissible [under Title VII] unless shown to measure the minimum qualifications necessary for successful performance of the job in question." *Lanning v. Southeastern Pennsylvania Transportation Authority,* 181 F.3d 478, 489 (3d Cir. 1999).

The need for empirical evidence of a relationship between test scores and job performance is incorporated in the *Standards for Educational and Psychological Testing (1999)* that were recently adopted by the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education. Under the *1999 APA Standards,* a passing score requires "evidence that scores are linked to different levels or likelihoods of success." Standard 14.7 states as follows:

> If tests are to be used to make job classification decisions (e.g., the pattern of predictor scores will be used to make differential job assignments), evidence that scores are linked to different levels or likelihoods of success among jobs of job groups is needed.

Chicago was unable to present empirical evidence of any relationship between test scores and future job performance. Chicago's expert conceded that there is no empirical evidence to show that scores on the "in-basket" or "oral"

components are related to job performance.[5] (Tr. 609, 535.) The expert cited a single, unpublished study to support his belief that scores on the written component of the test relate to job performance. (Tr. 513.)

The standard that the Seventh Circuit applied in determining the job-relatedness of the discriminatory test in this case is similar to that which this Court rejected in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There, the district court had approved the use of a general intelligence test, *Griggs v. Duke Power Co.*, 292 F.Supp. 243, 250 (M.D.N.C. 1968), and a divided panel of the Fourth Circuit affirmed,

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5. The test consisted of three sub-tests: a 150 question multiple choice "job knowledge" test, a 60 question multiple choice "in-basket" test, and an "oral examination."

   The written test questions were based on Police Department General Orders, Police Department Special Orders, Illinois statutes, sections of the Chicago municipal code, the union contract, and a booklet that described Chicago's community policing philosophy. Petitioners argued below that the "job knowledge" test placed an unnecessary emphasis on an applicant's ability to memorize written materials.

   The "in-basket" was a sixty question multiple choice test that candidates were required to answer after reviewing written materials. Testimony at trial established that the use of multiple choice questions represented a significant change from the classic "in-basket" discussed in the psychometric literature. Chicago's expert admitted that this "objective in-basket" had never been experimentally validated. (Tr. 600.)

   The oral examination required the applicant to review written materials and make an oral presentation that was tape recorded for later scoring. The scoring system for this test had been devised by Chicago's expert and had neither been peer reviewed nor experimentally validated. (Tr. 534-35.)

holding that Title VII required only that the employer show "a genuine business purpose" and that the test had not "been designed or used to further the practice of racial discrimination." *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1235 n. 8 (4th Cir. 1970). Here, the Seventh Circuit emphasized Chicago's good faith in establishing a "blue ribbon committee" to make recommendations about police promotions[6] (App. 5), in hiring a professional test developer (App. 5-6), and involving persons of all races in creating the test. (App. 12.) Neither the Fourth Circuit in *Griggs* nor the Seventh Circuit in this case required evidence that the test actually measured job performance.

This Court unanimously reversed the Fourth Circuit in *Griggs*, holding that in Title VII, Congress prohibited tests "unless they are demonstrably a reasonable measure of job performance." 401 U.S. at 436. The Court made plain that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id. at 431. The decision of the Seventh Circuit in this case is flatly at odds with these principles.

The Seventh Circuit in this case excused Chicago from showing that test scores were related to job performance and held that Chicago had met its burden of justifying its use of the test to promote those with the 108 highest scores by showing that the test "is job related and representative" (App. 12-13) and that the test had been constructed "to

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6. The committee recommended that job performance, attendance, medical, and disciplinary records should be considered along with test scores in in promotion decisions. Chicago ignored this recommendation until it sought to supplement test score promotions with merit promotions.

ensure [its] reliability." (App. 13.)

Reliability "refers to the consistency of such measurements when the testing procedure is repeated on a population of individuals or groups." *1999 APA Standards* at 25. A test may be *reliable* because applicants will consistently receive the same score, but the score is not *valid* unless it is an accurate predictor of future performance. For example, height can be reliably measured — repeated measures of an applicant's height will produce the same value. But the reliability of this measure does not mean that height is a valid predictor of success on the job.

In the view of the Seventh Circuit, Chicago was only required to show that test scores were a "reasonable measure of job performance," (App. 11), and Chicago could meet this burden with evidence about the "preliminary efforts," (App. 12), that had been made to develop the test, i.e., by showing "the knowledge, expertise, and experience of those involved in the test development," (App. 12), and detailing "the preliminary use of peer review and pilot testing of each of its three parts." (Id.)

The job relatedness standard adopted by the Seventh Circuit provides for equal employment opportunity "in the sense of the fabled offer of milk to the stork and the fox." *Griggs v. Duke Power Co., supra,* 401 U.S. at 431. The appropriate rule that comports with the "business necessity" standard of 42 U.S.C. §2000e-2(K)(1)(A) is that "a discriminatory cutoff score is impermissible unless shown to measure the minimum qualifications necessary for successful performance of the job in question." *Lanning v. Southeastern Pennsylvania Transportation Authority, supra,* 181 F.3d at 489. Certiorari should be granted to resolve the conflict between the circuits on this important issue.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

May, 2000

KENNETH N. FLAXMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
Attorney for Petitioners

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-1272 & 99-3475

LLOYD BRYANT, DESMOND BUTLER,
DORIS BYRD, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 1890 **Robert W. Gettleman,** *Judge.*

Argued September 30, 1999—Decided January 14, 2000

Before HARLINGTON WOOD, JR., COFFEY, and EVANS, Circuit Judges.

HARLINGTON WOOD, JR., Circuit Judge. Plaintiffs are forty-four African-American or Latino present or former sergeants of the Chicago Police Department. Plaintiffs failed to be promoted to lieutenant after taking the 1994 police lieutenant examination. Seven hundred sixty-five police sergeants took the examination of which 184 (24%) were African-American and 55 (7%) were Hispanic. The Police Department made 108 rank-order promotions based on the 1994 examination, granting promotions to those officers who obtained the highest 108 scores on the examination. Of the 108 officers promoted, five were African-American and one was Hispanic. Minority promotions, therefore, represented slightly less than 6% of the total number of promotions granted. It is undisputed that the 1994 examination had a

disparate impact on minority candidates, and the parties have stipulated that this statistical evidence constitutes a prima facie case of discrimination.

In 1995, the plaintiffs filed a complaint against the City of Chicago (the "City"), alleging that the City deprived them of equal employment opportunities in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000e, et seq. No claim was made by plaintiffs, however, that the City intentionally discriminated against them because of their minority status. Plaintiffs sought to preliminarily enjoin the City from making any rank-order promotions based on the 1994 lieutenant examination. The preliminary injunction was denied by the district court on the basis that plaintiffs had failed to establish either irreparable harm or the lack of an adequate remedy at law. The district court also found the balance of harms weighed against the granting of the preliminary injunction.

In a Title VII disparate impact case, the plaintiff bears the initial burden of establishing a prima facie case by showing that the promotional method in question had an adverse impact on minorities. If the plaintiff makes this required initial showing, the burden then shifts to the employer who must prove that the evaluation method is valid by showing that it is "job related" and "consistent with business necessity." 42 U.S.C. §2000e-2k(1)(A)(i). The evaluation method may be shown to be job related under any one of three tests: criterion related, content validity, or construct validity. Uniform Guidelines on Employee Selections Procedures, 29 C.F.R. §1607.5B. If the employer succeeds in validating the evaluation method, the burden shifts back to the plaintiff to prove that there was another available method of evaluation which was equally valid and less discriminatory that the employer refused to use. 42 U.S.C. §2000e-2k(1)(A)(ii); see also *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975).

This case was tried in a bench trial in March 1997. As previously mentioned, the City conceded an adverse impact on minority candidates because of their poor showing on the examination. In a thorough Memorandum Opinion and Order issued on June 30, 1998, the district court found that the 1994 examination was job related under the content validity approach, but agreed with the plaintiffs that the City had a less discriminatory but equally valid method of promotions available which it did not use, namely a combination of rank-order promotions with what are referred to as "merit promotions," a process which we shall examine in more detail shortly. When the court considered what relief was available under those circumstances, it found the record insufficient and set an additional hearing. That hearing resulted in a second Memorandum Opinion and Order issued on September 16, 1998. The court held that, in view of the equally valid but less discriminatory method which the City had not used, the court had the opportunity to broadly exercise its discretion in granting relief as outlined in 42 U.S.C. §2000e-5(g). The court, therefore, awarded some relief to sergeants other than the named plaintiffs. The court found the City's failure directly impacted thirteen sergeants, minority and non-minority, who had taken the 1994 examination. These thirteen officers had been chosen for promotion to lieutenant under the merit promotion plan, but had not been promoted.[1] Only one of these officers, Sergeant Raymond, is

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1. When the scores from the 1994 examination resulted in promotions in a racial pattern significantly different from the racial make-up of the applicant pool, the City attempted to rectify the situation by combining merit promotions with the rank-order promotions. Under this approach, twenty percent of the promotions would be based on a merit selection system rather than the examination results. The Superintendent of Police ordered highly-placed police officials to review the sergeants under their command and to nominate sergeants who met performance-related criteria such as education, seniority,

a plaintiff in the present case.

The court ordered the City to promote the thirteen directly injured sergeants to lieutenants and to award them differential back pay and other benefits from April 1995, the time when they had been passed over for promotion. Exceptions were made in individual cases where the candidate for some reason was no longer eligible for promotion.[2] The district judge declined to try to identify and promote any additional sergeants, stating that to do so "would be conjectural and overly subjective," as well as disruptive, and instead ordered the City to pay the plaintiffs who were not promoted a minimal award reflecting their lost opportunity to be selected for a merit promotion. The district court added that, except for certain disputed issues, the City was doing all it could "to promote racial and ethnic diversity among the

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prior assignments, discipline, and productivity. Those nominations were screened by an Academic Selection Board comprised of deputy superintendents and command personnel. As a result, the Superintendent approved merit promotions of thirteen additional sergeants to the rank of lieutenant. This action prompted a non-minority sergeant who failed to be slated for promotion to seek a state court injunction prohibiting the making of those promotions based on provisions of the Chicago Municipal Code which, he argued, barred the department from using merit selection. The injunction was issued and affirmed by the state appellate court, and the City did not grant the merit promotions.

2. The first opinion of the district court is reported in *Brown v. City of Chicago*, 8 F. Supp. 2d 1095 (N.D. Ill. 1998), and the second with the same case name at 19 F. Supp. 2d 890 (N.D. Ill. 1998). In an effort to avoid as much duplication of detail as possible those opinions can be read as a supplement to this opinion.

ranks of its lieutenants."

On appeal, plaintiffs contend that the City did not meet its burden of proving that the examination was content valid. If the examination is determined to be job related, however, then the plaintiffs argue that, based on its finding that the combination of rank-order and merit promotions represented an equally valid, less discriminatory alternative promotional method, the district court erred in failing to order additional merit promotions.

I. Background

Initially recognizing the difficulties of developing and administering an acceptable process for the hiring and promotion of police officers in a large metropolitan area, the Mayor of Chicago appointed a "Blue Ribbon Committee" to submit recommendations about how to proceed. The Vice Chairman of that committee, James Holzhauer, for instance, called by plaintiffs at trial, testified that he was a partner in the firm of Mayer, Brown and Platt and specialized in handling employment law matters. He was also a part-time faculty member teaching labor and discrimination law at the University of Chicago Law School. Further, Holzhauer had represented the Fraternal Order of Police and other police unions in the area of discrimination. Earlier in his career he had been a city manager and for a short period of time also had been the civilian police commissioner for an upstate New York police department. He explained how the Mayor's Committee had functioned and that the members were an independent task force not paid by the City. He was obviously qualified for this committee assignment.

One of the recommendations of the Mayor's Committee was that outside consultants be retained to develop and to administer promotion examinations. Following that recommendation the City retained Barrett & Associates, Inc., of Akron, Ohio, described as a "Human Resource Consulting Firm" specializing in employee matters including promotion

testing. The firm is headed by Dr. Gerald B. Barrett who holds a Ph.D. in psychology, as well as a law degree. He teaches testing and measurement, personnel selection, performance evaluation, and personnel psychology as well as law at the University of Akron. Dr. Barrett developed and administered the lieutenant examination challenged in this suit. Dr. Barrett and his firm had previously developed more than fifty examinations for police and fire departments including examinations for the cities of Cleveland and Akron, Ohio. Some of Dr. Barrett's work has been unsuccessfully challenged in court, including federal court. Along with Dr. Barrett and his firm, the City retained the Arthur Andersen company to aid in the grading of the examination.

Dr. Barrett was no stranger to the Chicago Police Department. In 1993, Dr. Barrett had developed an examination for promotion to Chicago Police Sergeant. In preparing that examination, Dr. Barrett conducted a job analysis of the sergeant position by interviewing approximately ninety Chicago sergeants along with twenty-eight lieutenants about their duties and responsibilities. For the lieutenant examination now in question, Dr. Barrett, following that same course, interviewed additional lieutenants, captains, and sergeants, including minorities. Dr. Barrett also toured the police districts, rode along with lieutenants on duty, observed the work of lieutenants, and reviewed applicable police documents, reports, and orders. Based on the data he gathered from his preliminary work, Dr. Barrett prepared a "Master Job Description" for the Chicago Police Lieutenant position. The Master Job Description identified what are referred to as "major work behaviors," including the associated tasks and responsibilities of lieutenants. In creating the Master Job Description, Dr. Barrett measured the importance and frequency of a lieutenant's tasks and responsibilities. Dr. Barrett also consulted certain source materials which contained information with which a lieutenant was expected to be familiar. These materials included Police Department policies and directives, certain sections of the Illinois Statutes and the

Chicago Municipal Code, the collective bargaining agreement of the Union, and the Department's community policing strategy. A list of those source materials was made available to the candidates prior to the examination.

The examination developed by Dr. Barrett had three components. The first was a written job-knowledge test consisting of 150 multiple choice questions derived from the source materials. It was first pilot tested and then further refined before being given. The next component of the examination was referred to as the "In-Basket Exercise." This exercise was based on a hypothetical situation which a candidate might face in an emergency where he or she would have to assume the duties of a lieutenant who had become ill or incapacitated. In this exercise, the lieutenant candidates were each presented with a packet of information simulating a lieutenant's in-basket. The candidates were allowed two and one-half hours to study the materials before being given ninety minutes to answer sixty multiple choice questions. The answers to these sixty questions were contained in the materials provided to the candidates, and the candidates were allowed to refer to these materials during the examination. The in-basket materials had first been reviewed by Chicago Police Department subject matter experts, and the exercise was also pilot tested prior to implementation. The purpose of the in-basket exercise was to measure necessary skills and abilities of possible lieutenants, not to test job-knowledge as was intended by the first component. Those responsibilities, for instance, required knowledge of reports, personnel actions, and the assignment of tasks.

The third component of the examination was an oral briefing exercise intended to demonstrate a candidate's analytical abilities and oral communication skills. This exercise simulated a Chicago Police Lieutenant's responsibilities at roll call. Each candidate was given materials about Chicago gang activity and related Department directives. The candidates were allowed twenty-five minutes to review those

materials and then they were required to give an oral briefing on the issue not to exceed ten minutes. During their oral presentations, candidates were allowed to refer to the materials and their own study notes. The oral presentations were recorded on audio tape for later review. A monitor sat in the room during the oral presentations, but was not permitted to communicate with the candidate. The oral presentation reviewers evaluated the recorded presentations without knowing the identity of the candidates. Three trained raters independently scored each presentation on an objective check list and then reached a conclusion about each of the candidates. This component had also been reviewed by Chicago Police Department subject matter experts and pilot tested.

II. Consideration of the Issues

Plaintiffs raise a number of arguments on appeal, but the core argument is that the district court committed reversible error when it accepted Dr. Barrett's testimony that the examination was content valid as sufficient evidence to rebut the plaintiffs' prima facie showing of disparate impact. Plaintiffs argue first that Dr. Barrett's testimony is inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and, secondly, that, even if admissible, Dr. Barrett's testimony is insufficient to justify the examination on which minorities fared so poorly. We address each of these arguments in turn.

A. Dr. Barrett's Testimony

Citing *Daubert*, plaintiffs characterize Dr. Barrett's testimony that the examination was content valid and that the final test scores could be used for rank-order promotions as nothing more than inadmissible conjecture, arguing that the testimony lacks "scientific validity." *Daubert* involved expert testimony in a personal injury suit involving a prescription drug taken by an expectant mother. The drug was alleged to have caused birth defects in plaintiff's

children. The district court granted summary judgment in behalf of the drug company finding petitioner's scientific evidence and the principle upon which it was based were not "sufficiently established to have general acceptance in the field to which it belongs." *Daubert*, 509 U.S. at 583. Likewise, plaintiffs in the present case claim that Dr. Barrett's opinions are unsubstantiated and lack "scientific validity." His opinions, it is argued, were nevertheless admitted by the district court because of Dr. Barrett's "expertise." Appellants contend that the district court's decision was erroneous.

Under *Daubert*, the testimony of a scientific expert is admissible only if it is both relevant and reliable. *Kumho Tire Co., Ltd. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999). In the present case, appellants challenge only the reliability of the admitted expert testimony. A district court enjoys broad latitude both in deciding how to determine reliability and in making the ultimate reliability determination. Id. It is clear from the record that the district court recognized the applicability of *Daubert* to Dr. Barrett's testimony. Furthermore, while appellants broadly assert that the district judge failed to consider *Daubert* in making his admissibility determination, their argument actually focuses on what they perceive to be the district court's improper application of the *Daubert* framework. Appellants contend that Dr. Barrett's testimony fails to meet the reliability prong of *Daubert* because there was no showing that his opinions were scientifically valid.

We review the district court's reliability determination for abuse of discretion, *Kumho Tire Co., Ltd.*, 119 S.Ct at 1171, and affirm. The *Daubert* inquiry is "a flexible one" and is not designed to serve as a "definitive checklist or test," *Daubert*, 509 U.S. at 593-94, but rather to ensure "that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co., Ltd.,

119 S.Ct. at 1176. In the present case, it is clear that Dr. Barrett's testimony had "'a reliable basis in the knowledge and experience of [the relevant] discipline.'" Id. at 1175 (quoting *Daubert*, 509 U.S. at 592). Dr. Barrett has extensive academic and practical experience in designing employment evaluations. Furthermore, it is not accurate to claim that the district judge declined to conduct an inquiry into the scientific validity of Dr. Barrett's opinion. As the district court noted, Dr. Barrett based his opinions, at least in part, on the job analysis that Barrett & Associates meticulously formulated which detailed a relationship between the skills measured in the examination and an individual's effectiveness as a lieutenant. Furthermore, while plaintiffs contend that the "general scientific literature" in the area consists of a single unpublished study, it is undisputed that Dr. Barrett himself has authored approximately fifty articles dealing with employee selection and promotion testing for peer-reviewed journals. This is not a case in which the expert failed to conduct any studies or analysis to substantiate his opinion. *See Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344 (7th Cir. 1995). Given these facts, it is clear that the district judge's decision to admit Dr. Barrett's testimony was not manifestly erroneous. See id.

B. Test Validity

Plaintiffs argue in the alternative that Dr. Barrett's testimony, if properly admitted, was insufficient to support a finding that the examination was job related. They contend that the 1994 test was not job related because it did not approximate the work situation. Plaintiffs cite *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Court held that, under Title VII, employment tests are forbidden which produce a disparate impact "unless they are demonstrably a reasonable measure of job performance." Id. at 436. Additionally, plaintiffs note that, in 1972, Congress realized that equal employment had been thwarted when employment was based on "criteria unrelated to job performance and on

discriminatory supervisory ratings," citing *Connecticut v. Teal,* 457 U.S. 440, 449 n.10 (1982). From these two cases it can be seen that, if a facially neutral employment practice has a significant discriminatory impact, the employer bears the burden of demonstrating that any requirement of employment imposed has a manifest relationship to the particular employment. Griggs makes clear, however, that even employment tests with a disparate impact are acceptable if "they are demonstrably a reasonable measure of job performance." *Griggs,* 401 U.S. at 436. It would be unrealistic to require more than a reasonable measure of job performance. It therefore is a matter of reasonableness, except in cases in which the plaintiff can show that the employer was using the practice as a mere pretext for discrimination. There is no claim, however, of employer pretext in the present case.

As previously noted, an evaluation method may be shown to be job related under any one of three tests: criterion related, content validity, or construct validity. *Gillespie v. State of Wisconsin,* 771 F.2d 1035, 1040 (7th Cir. 1985). In the present case, the district court found that the test was content valid. In evaluating content validity, a court must consider

> (1) the degree to which the nature of the examination procedure approximates the job conditions; (2) whether the test measures abstract or concrete qualitites; and (3) the combination of these factors, i.e. [sic] whether the test attempts to measure an abstract trait with a test that fails to closely approximate the working situation.

Id. at 1043.

In the present case, the district court recognized the correct standard for determining content validity. After considering all of the evidence, the court determined that the 1994 examination measured a significant portion of the knowledge, skills, and abilities necessary for a police

lieutenant and, therefore, was content valid. Because this is a factual finding, we will affirm the decision of the district court unless it is clearly erroneous. *Gillespie*, 771 F.2d at 1042.

The factual details we have already related about the development of the lieutenant test are enough to refute plaintiffs' arguments. The record shows not only the knowledge, expertise, and experience of those involved in the test development, but also the preliminary use of peer review and pilot testing of each of its three parts. Officers of various police ranks and experience, including minorities, were consulted during the development of the process. It would be totally unjustified to fail to take note of those preliminary efforts and, considering our standard of review, to reverse the trial judge who had carefully considered and weighed all the evidence before coming to the conclusion of test validity. The standard to be applied is not simply whether minorities do well or not on a test. That is only the beginning. It is obviously not impossible to develop a useful and nondiscriminatory test.

C. Validity of the Scoring System

Plaintiffs also raise an issue about the City's use of the examination scores to make promotions in rank order, citing Gillespie, 771 F.2d 1035, for the proposition that the use of rank-ordering must be independently justified when the scoring system results in a disparate impact. In Gillespie, this court relied on the Second Circuit's decision in *Guardians Ass'n of New York City v. Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980). The *Guardians* court recognized that an employer who wants to use rank-order scores for hiring decisions must demonstrate that rank-ordering is sufficiently justified. Id. at 103. That "task is by no means impossible," even without resort to a criterion related study of the issue. Id. Under *Guardians*, rank-order promotions can be validated by a substantial showing that (1) the test is job

related and representative and (2) the test maker achieved "an adequate degree of reliability." Id. at 104.

As previously discussed, the 1994 lieutenant examination was based on a detailed job analysis and was constructed in adherence to the Uniform Guidelines. *See Guardians Ass'n of New York City,* 630 F.2d at 104. The City has made a substantial showing of job relatedness sufficient to satisfy the first prong of the *Guardians* test. The reliability prong is also met. Barrett & Associates used a number of methods, including pre-testing, to ensure the reliability of the 1994 examination. See id. Furthermore, we agree with the Second Circuit's holding that when an examination measures ability with sufficient differentiating power to justify rank-ordering, it is permissible for the City to set a cut-off score at the point where the rank-ordering provides the number of promotions necessary to fill the City's available openings. See id. at 105. In the present case, the City's use of rank-ordering is valid, and the City was justified in setting a cut-off score which resulted in the necessary number of promotions.

The majority of plaintiff's remaining objections are de minimus and require no analysis. We affirm the trial judge's admission of Dr. Barrett's testimony and the court's conclusion about the validity of the tests, as well as the court's exercise of its discretion in appointing some additional sergeants to lieutenants and no more. *See EEOC v. Laborers' Int'l Union,* 49 F.3d 304, 307 (7th Cir. 1995) ("We review the decision to grant an equitable remedy under an abuse of discretion standard."). There is one remaining issue.

D. Attorney's Fees

On the merits, the district court held that the City's promotion test and scoring system were valid under Title VII. However, the court further held that plaintiffs had shown the existence of an equally valid, less discriminatory alternative to rank-order promotions, the merit promotion method. The

City likewise believed the use of this method was an equally valid, less discriminatory method, but argued that it was unavailable because the state court had enjoined its use. The district court found, however, that federal law prevailed over the state court action, relying on 42 U.S.C. §2000e-7. The City does not appeal this finding, so we need not pass on the validity of the merit promotion method, but we note that the parties agree as to the value of the merit method despite the fact that it includes a subjective element which minorities often find objectionable.

Following the district court's decision on the merits, plaintiffs applied for attorney's fees and costs under 42 U.S.C. §2000e-5(k). The district court denied plaintiffs' request in part on the basis that the issues on which plaintiffs did not prevail, the validity of the 1994 test and its scoring system, were unrelated to the issue regarding the availability of an alternative promotion method on which plaintiffs did prevail. The district court held that the two claims were distinct and independent and could have been pursued separately. The district court concluded that more than 90% of the time expended related exclusively to the issues of test validity on which the plaintiffs did not prevail. Nevertheless, the court compensated plaintiffs for 20% of their time spent for the entire litigation, describing that as "more than three times the percentage of the total time and expenses devoted to the issue on which plaintiffs prevailed."

The court adopted the City's suggested fee award of $134,699.88 for the litigation of the merits. The court then added $28,284.00 for the time expended in the remedy phase and $2,629.50 for time expended reviewing materials in a companion case. The court also awarded plaintiffs $10,915.00, the total amount of fees sought in connection with the presentation of the fee petition. This added up to fees in the amount of $176,528.38, considerably less than the requested lodestar fee amount of $518,445.85. Plaintiffs also sought $15,085.30 in statutory costs under 28 U.S.C. §1920

and $37,257.00 in expert fees and non-taxable costs.[3] The court allowed no specific costs related to the unsuccessful challenge to the validity of the examination, fixing total costs in the amount of $11,441.55.

Plaintiffs are not satisfied with the district court's substantial reduction in the amounts requested and assert that the district court committed legal error in holding that the validity of the 1994 examination was a separate claim from the existence of an equally valid, less discriminatory alternative promotion method. In response, the City argues that in a "mixed result" case as this one is, the district court may exercise broad discretion, and therefore, the fees award as limited by the district court should be affirmed.

This circuit has considered similar problems on a number of occasions attempting to apply the principles set forth by the Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). *See, e.g., Jaffee v. Redmond,* 142 F.3d 409 (7th Cir. 1998); *Kurowski v. Krajewski,* 848 F.2d 767 (7th Cir. 1988). Our case, *Spanish Action Comm. v. City of Chicago,* 811 F.2d 1129 (7th Cir. 1987), interprets *Hensley* in helpful language which we set forth in some length as that language cannot be substantially improved.

> In *Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983), the Supreme Court set out guidelines for calculating the proper amount of an attorney's fee award in cases where the plaintiff only partially prevails on his claims. The Court

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3. Expert fees are expressly authorized by 42 U.S.C. §2000e-5(k). Non-taxable costs are recoverable as part of the attorney's fees to be awarded. *Missouri v. Jenkins,* 491 U.S. 274, 285-89 (1989).

divided these partial recovery cases into two categories. The first category involves cases where the plaintiff presents distinctly different claims for relief that are based on different facts and legal theories. A plaintiff may not recover attorney's fees for time expended on an unsuccessful claim if that claim is "distinct in all respects from his successful claims." Id. at 440, 103 S. Ct. at 1943. Unrelated claims must be treated "as if they had been raised in separate lawsuits." Id. at 435, 103 S. Ct. at 1940.

* * *

The second category of partial recovery cases, into which this action does fall, includes those cases in which the plaintiff's claims for relief involve a common core of facts or are based on related legal theories. Because the majority of counsel's time will be devoted to the litigation as a whole, as opposed to any one specific claim, this type of lawsuit cannot be viewed as a series of discrete claims. As a result, time spent on related claims that ultimately prove unsuccessful should not be automatically excluded from the attorney's fee calculation. Instead, the focus in arriving at the appropriate fee award should be on "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley,* 461 U.S. at 435, 103 S. Ct. at 1940.

* * *

Where the plaintiff fails to obtain all that he reasonably could have asked for and achieves only partial or limited success, the lodestar amount—the product of the number of attorney's hours reasonably expended on the litigation as a whole times a

> reasonable hourly rate—likely to be excessive. The Supreme Court therefore provided: "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley,* 461 U.S. at 440, 103 S. Ct. at 1943. The Court, however, articulated no precise rule or formula to be followed in making such a reduction, instead choosing to leave this determination to the discretion of the district court in view of its greater familiarity with the litigation. Id. at 436-37, 103 S. Ct. at 1941. The Court did indicate that in reducing a fee award to reflect the plaintiff's limited success, a district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award across the board to account for the limited success. Id.

Spanish Action Comm., 811 F.2d at 1133.

In the present case, the district judge recognized that the relief obtained was very limited in relationship to the total relief sought. As *Hensley* points out, in such cases, a reduced fee amount is appropriate. *Hensley,* 461 U.S. at 440. As we have already noted, *Hensley* does not require the application of a precise rule or formula, leaving fee reduction to the discretion of the trial court. *Spanish Action Comm.,* 811 F.2d at 1133. In reducing a fee award, a district court may attempt to identify specific hours to be eliminated or it may "simply reduce the award across the board to account for the limited success." Id. (citing *Hensley,* 461 U.S. at 436-37).

The district court determined that more than 90% of time expended by plaintiffs related exclusively to plaintiffs' "main goal" of having the 1994 examination declared invalid. That left less than 10% of plaintiffs' time which could be applied to their successful claim. The court did not automatically limit plaintiffs' fee award to 10% however, but

went on to allow plaintiffs' fees for 20% of their time spent on the entire litigation, noting that this amount represented more than three times the percentage of the total time and expense devoted to the issues on which plaintiffs prevailed. The district court also allowed fees for 20% of the time plaintiffs' counsel spent reviewing materials in a companion case. In addition, plaintiffs' attorneys were awarded 100% of their fees in the remedy phase of the case and in prosecuting their fee petition. These fee and cost allowances we view as not only fair and reasonable, but practical. It, therefore, makes no difference that the court originally viewed each of the claims as separate as the applicable fee criteria was fully satisfied.

III. Conclusion

The district court is affirmed in all respects. The parties shall bear their own costs.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-1272 & 99-3475

LLOYD BRYANT, DESMOND BUTLER,
DORIS BYRD, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 1890 **Robert W. Gettleman,** *Judge.*

[January 14, 2000]

JUDGMENT — ORAL ARGUMENT

Honorable Harlington Wood, Jr., Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Terrence Evans, Circuit Judge

The judgment of the District Court is AFFIRMED in accordance with the decision of this court entered on this date. Each party to bear their own costs.

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 1890 **Robert W. Gettleman,** *Judge.*

[February 16, 2000]

ORDER

Honorable Harlington Wood, Jr., Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Terrence Evans, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERNEST T. BROWN, LLOYD E. BRYANT, et al.

Plaintiffs,

No. 95 C 1890 *v.*

CITY OF CHICAGO,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

GETTLEMAN, District Judge.

This action, having been tried upon the facts by the court without a jury on plaintiff's motion for a preliminary injunction pursuant to Fed.R.Civ.P. 65, the court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

I.A The Plaintiffs And Their Complaint

1. Plaintiffs are 44 African-American or Hispanic members of the Chicago Police Department ("CPD") who hold the career service rank of sergeant and participated in the 1994 lieutenant promotional examination.

2. Plaintiffs have not been promoted to the rank of police lieutenant based on the results of the 1994 police lieutenant examination.

3. On March 28, 1995, plaintiffs filed a complaint in this action challenging the 1994 police lieutenant examination process under 42 U.S.C. §1981 and 42 U.S.C. §1983.

4. On December 5, 1995, plaintiffs filed their First Amended Complaint, adding a Title VII disparate impact claim.

5. On February 9, 1996, in open court, plaintiffs abandoned their §1981 and §1983 claims.

6. Plaintiffs contend, inter alia, that the test has a disparate impact upon African-Americans and Hispanic police sergeants and is an unlawful employment practice under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e.

7. The 1994 lieutenants' test was completed by 765 police sergeants: 31% of those who took the test were African-American or Hispanic. The City intends to make a total of 108 promotions from the 1994 lieutenant list; less than 6% of these promotions will go to African-American or Hispanic police sergeants.

8. Defendant City of Chicago has to date made 54 promotions from the 1994 promotional roster. 51 of those promoted were white. As the result of these promotions (51 white sergeants and 3 minority sergeants), the percentage of African-American and Hispanic lieutenants has decreased to 19%.

9. The position of lieutenant is the rank form which higher level supervisors in the police department are generally selected.

I.B The 1994 Police Lieutenant Examination

10. In 1990, Mayor Richard M. Daley formed a Blue Ribbon Panel, consisting of distinguished members of the law enforcement profession, to make recommendations regarding promotional practices in the CPD.

11. The Blue Ribbon Panel recommended that the City use an outside consultant to design and administer CPD promotional examinations.

12. Consistent with the recommendation from the Mayor's Blue Ribbon Panel that the City use an outside consultant to design and administer CPD promotional

examinations, the City retained Barrett & Associates, Inc., to develop and administer the 1994 police lieutenant examination.

13. Barrett & Associates, Inc. ("Barrett"), is a consulting firm that has specialized in the development of employee selection and promotional examinations since 1973.

14. Since 1973, Barrett has developed about a dozen police and fire examinations for municipalities.

15. The test components and the weights of those components were announced to the candidates prior to the administration of the 1994 police lieutenant examination.

16. Barrett agreed to develop a content valid, nondiscriminatory CPD lieutenant examination.

17. A content valid test is designed to measure the knowledge, skills and abilities needed to perform the job.

18. The EEOC Uniform Guidelines recognize content validity as an appropriate method of test validation.

19. The initial phase of Barrett's test development included a job analysis to identify the major work behaviors and the related knowledge, skills and abilities ("KSAs") for the job of Chicago police lieutenant.

20. Shortly before Barrett began its job analysis, an organization known as HR Strategies had prepared a job analysis of the position of lieutenant in the CPD. That job analysis also identified various KSAs essential for the lieutenant job.

21. Barrett reviewed and used the HR Strategies job analysis as part of the preparation of its job analysis.

22. Barrett's job analysis consisted of interviews of incumbent lieutenants and other CPD supervisory personnel, ride-alongs, first hand observations of the job of Chicago

police lieutenant and a review of all relevant departmental and organizational documents.

23. The culmination of Barrett's interviews, document reviews and ride-alongs was a master job description for the position of police lieutenant that Barrett prepared.

24. Four CPD lieutenants reviewed Barrett's master job description for accuracy and completeness.

25. Once the major work behaviors and responsibilities of the position of a Chicago police lieutenant were identified and their importance and frequency measured, the job analysis interviewers identified the KSAs associated with those major work behaviors.

26. Barrett then linked the job analysis and the job description to the content of the three test battery components: a written job knowledge test, an "in-basket" simulation and an oral briefing exercise.

27. The written job knowledge component was a 150 question multiple choice examination designed to test a candidate's knowledge of CPD General Orders, Special Orders, Illinois Compiled Statutes and Chicago Municipal Ordinances. CPD lieutenants must know the General Orders, Special Orders and Illinois statutory law.

28. The written job knowledge component also tested reading comprehension.

29. In an effort to ensure the relevance and accuracy of the questions on the written job knowledge component, each of the written test questions was reviewed by CPD subject matter experts Chief of Patrol John Cadogan, Lieutenant John Klein, Deputy Chief William Shaw, who is African-American, and Commander Joseph Delopez, who is Latino. Barrett added, deleted or modified test items based on feedback from these CPD subject matter experts. The CPD

subject matter experts found that the written job knowledge test was related to the job of police lieutenant.

30. The in-basket component was designed to assess the administrative skills identified as important for the successful performance of the job of Chicago police lieutenant. It involved reviewing documents and answering multiple choice questions. It was designed to closely approximate items that a Chicago police lieutenant might find in an in-basket.

31. CPD subject matter experts Cadogan, Klein, Delopez and Shaw reviewed the in-basket component to ensure relevance and credibility. The CPD subject matter experts found the in-basket component complete and appropriate.

32. The oral briefing exercise was designed to measure those job dimensions identified during the job analysis as vital to successful performance as a Chicago police lieutenant, such as analytical ability and organizational and oral communication skills. It involved reviewing documents and making a speech into a tape recorder. The exercise was designed to simulate a roll call in which the lieutenant candidate had to inform officers about a new gang on the street.

33. Chief Cadogan and Lieutenant Klein reviewed the oral briefing exercise. Barrett made revisions to the oral briefing exercise based on their recommendations.

34. The ability to write clearly and concisely is an important part of the job of lieutenant.

35. The ability to listen to oral communications from other officers and citizens is an important part of the job of lieutenant.

36. The 1994 lieutenant examination did not test directly for listening skills, but did test this skill indirectly by testing reading comprehension.

37. The 1994 lieutenant examination did not test for writing skills.

38. The three components of the 1994 police lieutenant examination were weighted equally.

39. The reading list for the 1994 lieutenant test from which examination questions were drawn was given to all of the candidates prior to the examination.

40. All of the 1994 police lieutenant candidates were given the same examination, regardless of race.

41. Each 1994 police lieutenant candidate's test was scored the same way, regardless of race.

42. The 1994 police lieutenant test scores were combined and weighted in the same manner, regardless of race.

43. A procedure was available for candidates to challenge questions and answers on the 1994 police lieutenant examination, although there was evidence that some candidates may not have been aware of the procedure. There were only four challenges to the written job knowledge component, one challenge to the in-basket component and a few challenges to the oral component. Barrett and a CPD representative reviewed those challenges and re-keyed portions of the test based on that review.

I.C Attempts To Minimize The Adverse Impact Of The 1994 Lieutenant Examination

44. The 1994 police lieutenant examination had an adverse impact on African- American and Hispanic candidates under the 80% rule of the Equal Employment Opportunity Commission's Uniform Guidelines On Employee Selection Procedures, 29 C.F.R. §1607.4(d) (1978).

45. White sergeants received 193 of the top 207, 282 of the top 316, and 350 of the top 413 scores on the "job knowledge" component.

46. White sergeants received 181 of the top 203, 271 of the top 313 and 356 of the top 442 scores on the "in basket" component.

47. White sergeants received 171 of the top 195, 303 of the top 383, and 412 of the top 540 scores on the "oral examination" component.

48. White sergeants received 102 of the top 108, 186 of the top 200, 273 of the top 300 and 348 of the top 400 combined scores that comprise the final promotional roster.

49. Barrett took the following steps during the test development process to try to minimize adverse impact: 1) minority CPD lieutenants and supervisors were interviewed during the job analysis; 2) the reading level of the 1994 police lieutenant test was below the reading level of the source material lieutenant candidates read to prepare for the test; and 3) the question writers received diversity training.

50. Barrett also did a computer simulation to see if a different weighting scheme might produce less adverse impact without compromising validity.

51. The results of the hypothetical computer simulation indicated that the number of minority promotions would triple (but would not eliminate the disparate impact) if the oral examination was weighted 60% and the written components were each weighted 20%. These results did not change Barrett's opinion that based on industry standards, Barrett's job analysis and HR Strategies' job analysis the test components should be weighted equally.

52. The City also considered making approximately 80% of the promotions based on the score results of the 1994 police lieutenant examination and 20% of the promotions based on past job performance. The City determined that selecting more than 20% of the promotions based on past performance rather than examination results would have been unreliable.

53. This alternative promotional system would have resulted in the promotion of additional minority sergeants.

54. The City has been unable to make any promotions pursuant to this alternative system because the Appellate Court of Illinois has ruled that Illinois law requires the City to use the results of the Barrett test to make strict rank order promotions as announced to the candidates prior to the examination. *McArdle v. Rodriguez*, 277 Ill.App.3d 365, 213 Ill.Dec. 709, 659 N.E.2d 1356 (1995).

55. The City does not have any empirical evidence to demonstrate that sergeants who score higher on the examination will perform better as lieutenants than those who receive lower scores.

56. There are police sergeants within the CPD who have extremely high potential to be lieutenants but who do not score well on paper and pencil tests.

I.D The April 6, 1995 Lieutenant Promotions

57. The City decided to promote 54 sergeants to the rank of lieutenant based on the results of the examination components Barrett developed.

58. The City also decided to make 13 additional promotions based on past job performance without regard to scores on the Barrett test.

59. An Academic Selection Board, a panel comprised of CPD deputy superintendents and the commander of the training division, reviewed nominations from CPD exempt rank personnel and determined who would be promoted in the group of 13 based on past job performance.

60. The 13 selected for promotion based on past performance included both minorities and non-minorities.

61. On March 20, 1995, Sergeant James McArdle, who is not a plaintiff in this action, filed a lawsuit, *McArdle v. Rodriguez*, No. 95 CH 2498, seeking a preliminary injunction

to enjoin the promotion of the 13 lieutenant candidates selected based on past job performance.

62. The Circuit Court of Cook County issued a preliminary injunction, enjoining the City from promoting the 13 candidates selected based on past job performance. The Appellate Court affirmed the issuance of the preliminary injunction. *McArdle v. Rodriguez,* 277 Ill.App.3d 365, 213 Ill.Dec. 709, 659 N.E.2d 1356 (1995).

63. Therefore, on April 6, 1995, the City promoted only the 54 candidates based on the rank order results of the 1994 police lieutenant examination. Fifty-one of those promoted were white.

I.E The Next Round Of Lieutenant Promotions

64. The City has announced that it plans to promote an additional 54 sergeants to lieutenant. Fifty-one of those sergeants to be promoted are white. These promotions would decrease the percentage of African-American and Hispanic police lieutenants to slightly less than 14%.

65. In January 1996, the City announced that it would make 18 promotions in rank order based on the results of the 1994 police lieutenant examination.

66. The 18 sergeants entered the Training Academy on February 16, 1996, and are scheduled to be promoted to lieutenant on March 8 or March 11, 1996.

I.F The CPD's Operational Needs And Public Safety

67. District Law Enforcement, part of the CPD patrol division, is responsible for day to day law enforcement for the City of Chicago. It is comprised of 25 districts located throughout Chicago.

68. Operations in each police district are divided into three eight hour shifts, called "watches." District operations during a watch are supervised by a "watch commander." A watch commander is either a lieutenant or captain.

69. While overall patrol operations for each district are supervised by a watch commander, field operations during each watch are supervised by lieutenants. The CPD needs at least 177 lieutenants to provide adequate supervision for police officers in the field.

70. During the last three weeks of December 1995 and the first week of January 1996, in District Law Enforcement: on the first watch, 68% of the time there was no field lieutenant; on the second watch, 71% of the time there was no field lieutenant; and on the third watch, 74% of the time there was no field lieutenant.

71. In order to provide adequate supervision for patrol operations, District Law Enforcement requires at least 252 captains and lieutenants: 75 watch commanders and 177 field lieutenants. Currently, the division has 215 captains and lieutenants. Thus, District Law Enforcement is short approximately 37 lieutenants.

72. The special functions groups of the CPD patrol division include the public housing division, the public transportation division, the traffic division, and the airport law enforcement division.

73. The special functions groups must have 21 lieutenants in order to be properly staffed. Currently, the special functions groups have only 15 lieutenants. Thus, the special functions groups are short six lieutenants.

74. There also are shortages of lieutenants in the CPD's internal affairs division, the intelligence division, the gang crimes section, the detective division and the youth division.

75. Since 1994, the CPD has hired and placed on the street approximately 2,400 new patrol officers.

76. Additional lieutenants are needed to supervise and give direction to the 2,400 new patrol officers in order to

provide effective police services.

77. The CPD expects the retirement of at least six lieutenants and captains during the next several months. Additional promotions are necessary to fill those vacancies.

78. The rank of captain is being phased out and no further promotions to that rank will be made.

79. Training for new lieutenants must be concluded without delay so that those supervisors can be deployed in advance of a large number of upcoming events. The following events in Chicago will place an additional burden on the CPD's manpower and require additional supervisory officers:

a. The St. Patrick's Day Parade;

b. The Democratic National Convention;

c. The 150 other special spring and summer events, including concerts, parades and festivals.

80. The Chicago Alternative Policing Strategy ("CAPS") is a recently instituted community-based crime prevention program within the CPD. CAPS is designed to address chronic crime and disorder problems within the City of Chicago.

81. The fact that lieutenants will play a key role in the operations of the CAPS program increases the need for promotions to the rank of lieutenant.

82. The fact that the 1994 police lieutenant examination is in litigation has caused a morale problem, regardless of the result of the preliminary injunction hearing or the outcome of this case.

83. Although the CPD desires a diverse workforce, and is concerned about morale, the overriding operational need for more lieutenants outweighs all other concerns.

I.G Interests Of The Plaintiffs And Other Lieutenant Candidates

84. If the announced promotion of the 18 new lieutenants is not enjoined and plaintiffs ultimately prevail in this litigation and receive promotions, none of those 18 promoted lieutenants would be demoted to make room for plaintiffs, and plaintiffs would not seek the demotion of those 18 lieutenants.

85. Appointments to exempt rank positions (the CPD's executive officers) generally are made from the lieutenant rank. There is no length of time that an officer must serve as a lieutenant before appointment to an exempt position. Not every lieutenant is ultimately promoted to an exempt rank appointment.

86. Some of the African-American and Hispanic officers who are high ranking members of the CPD were promoted to lieutenant as a result of promotional quotas required by previous court decisions. Some of those promoted to lieutenant pursuant to court order were later promoted to exempt rank positions.

87. If plaintiffs prevail in this litigation they may be awarded promotion, back-pay, pension benefits and seniority in title.

88. Any stigma that may occur as a result of court ordered out of rank order promotions would occur regardless of when those promotions are made or whether they are made at the same time as rank order promotions. Although some of plaintiffs' witnesses testified that they experienced difficulties after being promoted to lieutenant as a result of protracted litigation and court order, they also established that lieutenants thus promoted could succeed in the CPD and ultimately be promoted to exempt rank positions as high ranking executive officers.

II. CONCLUSIONS OF LAW

I.H Preliminary Injunction Standards

1. The court has jurisdiction over the parties and the subject matter of this controversy pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.

2. To prevail on a request for a preliminary injunction, the movant has the burden to show, as a threshold matter, (1) some likelihood of succeeding on the merits, and (2) that he or she has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied. *Roth v. Lutheran General Hospital,* 57 F.3d 1446, 1453 (7th Cir. 1995); *Storck U.S.A., L.P. v. Farley Candy Co.,* 14 F.3d 311, 313 (7th Cir. 1994); *Abbott Laboratories v. Mead Johnson & Co.,* 971 F.2d 6, 11 (7th Cir. 1992).

3. If the movant cannot establish some likelihood of success on the merits and irreparable harm, then the court's inquiry ends and the preliminary injunction motion must be denied. *Abbott Labs.,* 971 F.2d at 11.

4. If the movant is able to establish some likelihood of success on the merits and irreparable harm, then the court must balance that showing with the harm to the non-movant and the public if injunctive relief is granted. *Roth,* 57 F.3d at 1453; *Abbott Labs.,* 971 F.2d at 12.

5. The balancing of the equities involves a "sliding scale" approach: the less likely it is that the moving party will succeed on the merits, the stronger must be the showing that the balance of harms weighs in favor of the moving party. *Storck,* 14 F.3d at 313-14; *Abbott Labs.,* 971 F.2d at 12.

I.I Plaintiffs Cannot Establish Irreparable Harm

6. The court concludes that plaintiffs will not suffer irreparable harm if the injunction preventing the promotion of 18 sergeants to lieutenant is not granted:

A. The evidence clearly establishes that there are well over 52 (18 promoted plus the 44 plaintiffs) openings for lieutenant in the CPD. Therefore, even if the 18 are promoted now, these plaintiffs can be promoted later;

B. Whatever stigma plaintiffs may suffer (if any) if they are promoted as a result of a court order in this case will result regardless of when such promotion takes place and whether the 18 scheduled promotions are made;

C. Moreover, the evidence clearly establishes that sergeants who have been promoted to lieutenant pursuant to court order have suffered little, if any, lasting stigma. The evidence established that lieutenants promoted as a result of court order have been promoted to exempt rank positions. There was no evidence that any sergeant so promoted was denied or delayed further promotion because of the circumstances surrounding his or her promotion to lieutenant. Therefore, there has been no showing that plaintiffs will suffer any harm that cannot be remedied by a final order in this case should they ultimately prevail. In the event plaintiffs prevail, there is an adequate remedy at law: the court can order their promotion, back pay, pension benefits, and seniority in title. *Ciechon v. City of Chicago,* 634 F.2d 1055, 1058 (7th Cir. 1980). Because further promotion to exempt rank is based entirely on merit, not on length of service as a lieutenant, plaintiffs will suffer no other discrimination with respect to their terms, conditions or privileges of employment.

7. Plaintiffs' failure to establish irreparable harm is sufficient, on its own, to deny their motion for preliminary injunction. *Abbott Labs. v. Mead Johnson & Co.,* 971 F.2d 6, 11 (7th Cir. 1992).

I.J Plaintiffs Cannot Demonstrate A Likelihood Of Success On The Merits Of Their Disparate Impact Title VII Claim

8. Section 105 of the Civil Rights Act of 1991, 42 U.S.C. §2000e-2(k)(1)(A), restored the order of proof established by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Under that standard, if a plaintiff establishes that an employee selection device has had a disparate impact, the burden shifts to the employer to demonstrate that the selection device is "job-related for the position in question and consistent with business necessity." 42 U.S.C. §2000e-2(k)(1)(A)(i).

9. If the employer establishes that the selection device is job-related, the burden shifts back to the plaintiff to demonstrate that there was a substantially equally valid alternative selection device with less adverse impact available and that the employer refused to use it. 42 U.S.C. §2000e-2(k)(1)(A)(ii); *Officers for Justice v. Civil Service Commission*, 979 F.2d 721, 728 (9th Cir. 1992).

10. Because plaintiffs bear the burden in a preliminary injunction motion of demonstrating that they are likely to succeed on the merits, *Cox v. City of Chicago*, 868 F.2d 217, 219 (7th Cir. 1989), it is not enough for plaintiffs to establish a prima facie disparate impact case in this proceeding. Plaintiffs also must prove some likelihood that defendant will be unable to establish that the 1994 lieutenant examination is not job-related.

11. The 1994 police lieutenant examination has an adverse impact on African- American and Latino candidates under the 80% Rule of the Equal Employment Opportunity Commission's Uniform Guidelines On Employee Selection Procedures, 29 C.F.R. §1607.4(d) (1978).

12. The evidence presented was insufficient for the court to determine which, if either, party has a greater

likelihood of success on the merits. For example, plaintiffs did not establish that the City refused to use a legally available equally valid alternative selection device which would have less adverse impact. 42 U.S.C. §2000e-2(k)(1)(A)(ii). The City, on the other hand, failed to demonstrate, even for purposes of this preliminary injunction motion, that the test is content valid. *Gillespie v. Wisconsin*, 771 F.2d 1035, 1044 (7th Cir. 1985) (a content valid test is job-related under Title VII). It should be noted that plaintiffs presented no expert testimony at the preliminary injunction hearing to support their claim that the test was not content valid or that there existed an equally valid alternative selection device. Questions also remain about the propriety of weighting each component equally. Plaintiffs, of course, as the movants, have the burden to establish at least some likelihood of success. After reviewing the evidence, the court concludes that plaintiffs have established, at best, that they are no more likely to succeed than defendant.

13. Because the likelihood of success on the merits is approximately equal at this stage of the litigation, plaintiffs' failure to establish irreparable harm or an inadequate remedy at law favors denial of their preliminary injunction motion under the sliding scale approach as set forth in *Abbott Labs.*, 971 F.2d at 11.

I.K The Balance of The Harms Weighs Against Granting A Preliminary Injunction

14. Even assuming, arguendo, that plaintiffs were able to establish irreparable harm and a likelihood of success on the merits, the City's operational need to promote lieutenants to provide police services to the community in the coming months and to ensure public safety outweighs plaintiffs' private interests. *Roth*, 57 F.3d at 1453 (the harm to the movants must be balanced against the harm to the non-movant and the public). The uncontroverted evidence established that the City has hired approximately 2,400 new police officers in the past two years, and that more lieutenants

are needed to provide adequate supervision and training. In addition, the evidence demonstrated that the City's new CAPS program is based on police beat teams that are heavily dependent on supervision from lieutenants.

I.L The Public Interest Weighs Against Granting a Preliminary Injunction

15. The public interest clearly favors denial of an injunction. The undisputed evidence established that there is an immediate need for the proposed promotions. There are a number of special events planned, including the Democratic National Convention, that will require extensive police services. Although the CPD would manage to service these events in the absence of the proposed promotions, it would be better able to provide needed police services to the public with the additional lieutenants who are scheduled to be promoted.

16. Finally, the court notes the good faith of all parties in this litigation, based upon the evidence presented to date. The admitted disparate impact of the 1994 lieutenants examination on minority sergeants does not appear to have been intended by the City of Chicago or anyone involved with the design of the examination and the promotion process. To the contrary, the evidence presented at the hearing indicated the disappointment and frustration of the leadership of the CPD with the disparate impact on minorities. Nor should plaintiffs be faulted for presenting their grievances to this court, especially in light of persuasive evidence that a person can succeed admirably as a police lieutenant despite having scored poorly on an examination. The court applauds the CPD's intention to scrap the 1994 examination as soon as possible and to attempt to devise a better way to identify the best candidates for police lieutenant, consistent with state and federal law.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, plaintiffs' motion for preliminary injunction is

denied. The parties are ordered to prepare a written discovery plan for presentation to the court on April 4, 1996, at 9:30 a.m.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERNEST T. BROWN, LLOYD E. BRYANT, et al.

Plaintiffs,

No. 95 C 1890 *v.*

CITY OF CHICAGO,

Defendant.

MEMORANDUM OPINION AND ORDER

GETTLEMAN, District Judge.

I. INTRODUCTION

Did the defendant City of Chicago ("City") discriminate against minority Chicago police sergeants when it decided to make promotions to the rank of lieutenant based on an examination which the City developed with the acknowledged intention of avoiding an adverse impact on minorities? This case continues a series of attacks on successive attempts by the City to make police promotions based on criteria that would pass muster in the courts.

Plaintiffs are 44 minority (African-American and Latino) Chicago Police Department ("CPD") sergeants who took the 1994 lieutenant examination and were not promoted based on their scores. They claim that the City deprived them of equal employment opportunity in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000e, et seq. In light of the City's stipulation that the examination had an adverse impact on minority candidates, plaintiffs contend that, (a) the City has not met its burden of proving that the examination was a job related, content valid selection device, and (b) even if the test were valid, plaintiffs have

demonstrated there was an equally valid, less discriminatory alternative selection method available which the City refused to use.

The case was tried to the court in November 1997. Extensive expert testimony and other evidence was presented. Thereafter, the parties submitted voluminous post-trial briefs and proposed findings and conclusions, and argued the matter to the court on March 6, 1998. Finally, on March 31, 1998, the parties submitted supplemental memoranda on the issue whether there existed an available, less discriminatory selection method than the rank order test. For the reasons set forth below, the court finds that the examination was content valid, but that the City had available a less discriminatory equally valid method of promotion utilizing merit selection along with rank order promotions.

II. LEGAL STANDARDS

In a Title VII case alleging discrimination in the promotion process, once the plaintiff proves a prima facie case by showing that the promotional method had an adverse impact on minorities—as is stipulated in the instant case—the burden shifts to the employer to prove that the test is valid. If the employer meets this burden, the plaintiff must prove that there was an available, equally valid, less discriminatory method for promotion that the employer refused to use. *Albemarle Paper v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Thus, the first issue presented is whether the City met its burden of proving that the test was valid, or "job related." Id.; 42 U.S.C. §2000e-2(k)(1)(A).

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Supreme Court held that the employer must demonstrate that the test has "a manifest relationship to the employment in question" that reasonably measures job performance. Id. at 432, 436, 91 S.Ct. 849. "A test is job related if it measures traits that are

significantly related to the applicant's ability to perform the job." *Gillespie v. State of Wisconsin,* 771 F.2d 1035, 1040 (7th Cir. 1985) (citing *Griggs*).

The Equal Employment Opportunity Commission ("EEOC") has promulgated Uniform Guidelines on Employee Selection Procedures ("EEOC Guidelines"), 29 C.F.R. §1607, et seq., which draw upon current psychological literature on psychometrics as well as standards for test validation established by the American Psychological Association. *Gillespie,* 771 F.2d at 1040. Under the EEOC Guidelines (§1607.5B), an employment test may be validated under any one of three methods: criterion related; content validity; or construct validity. No one method is preferred; any of the three may be used by the employer to establish validity and shift the burden back to the employee.

In *Gillespie* (Id. at n. 3), Judge Coffey succinctly described these three methods: A criterion-related validation study determines whether the test is adequately correlated with the applicant's future job performance. Wollack, *Content Validity: Its Legal and Psychometric Bases, Personnel Management,* Nov-Dec 1976, 397 at 402 (hereinafter "Wollack"). Criterion-related tests are constructed to measure certain traits or characteristics thought to be relevant to future job performance. Id. at 403. An example of an employment test that would be validated by the criterion-related validation method is an intelligence test. The content validation strategy is utilized when a test purports to measure existing job skills, knowledge or behaviors. Id. "The purpose of content validity is to show that the test measures the job or adequately reflects the skills or knowledge required by the job." Id. For example, a typing test given to prospective typists would be validated by the content validation method. Construct validity is used to determine the extent to which a test may be said to measure a theoretical construct or trait. Anastasi, *Psychological Testing,* 144 (1982) (hereinafter "Anastasi"). For

example, if a psychologist gave vocabulary, analogies, opposites and sentence completion tests to a group of subjects and found that the tests have a high correlation with one another, he might infer the presence of a construct—a verbal comprehension factor. Anastasi at 146.

In the instant case, the City has sought to establish the validity of the 1994 lieutenants' examination by showing that the test was content valid. Section 1607. 14(C)(4) of the EEOC Guidelines provides: [T]o be content valid, a selection procedure measuring a skill or ability should either closely approximate an observablework behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles the work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

In determining whether an employment test is content valid, the court in *Gillespie* (771 F.2d at 1043) held that, . . . the court must evaluate the test for: (1) the degree to which the nature of the examination procedure approximates the job conditions; (2) whether the test measures abstract or concrete qualities; and (3) the combination of these factors, i.e. whether the test attempts to measure an abstract trait with a test that fails to closely approximate the working situation. [Citing *Guardians Ass'n of New York City v. Civil Service Commission,* 630 F.2d 79, 93 (2d Cir. 1980); *Wollack* at

405.06.]

Should the employer meet its burden of proving validity, the statute provides that the employee can succeed if he or she proves that there was an available, equally valid, less discriminatory method of promotion that the employer refused to use. 42 U.S.C. §2000e-2(k)(1)(A)(ii). In such an event, the plaintiffs would be entitled to injunctive and affirmative relief. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 448, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986).

III. THE PARTIES' CONTENTIONS

Before addressing the facts and the application of the facts to the law, it is useful to understand the basic positions of the parties. Plaintiffs' argument rests to a large extent on a syllogism:

a. The results of the 1994 lieutenants' examination had a gross adverse impact on minority applicants;

b. Minorities as a group are as equally qualified as whites to be Chicago Police Department lieutenants;

c. Therefore, the examination is, perforce, invalid because it eliminated applicants who were admittedly qualified.

The City defends its examination as content valid, claiming that it was designed to and did in fact measure knowledge, skills and abilities ("KSAs") required for the job of police lieutenant. Once having established that, the City contends that it need not explain why the test might have resulted in the failure to promote qualified applicants (a criterion-related method of proving validity that need not be employed once content validity is established).

Plaintiffs' argument that there was an available, equally valid, less discriminatory method of promotion that the City refused to use, relies on the City's own attempt to adopt a proposal to promote 20% of lieutenants based on a merit selection system rather than solely on the 1994 examination. The City argues (1) (without much conviction) that this method was not equally valid, and (2) (which much conviction) that even if it were equally valid, the addition of a merit selection component to promotions was unavailable because the state courts enjoined the City from using that method.

IV. THE FACTS

IV.A Agreed Facts

The following facts have been stipulated to by the parties, and, with certain stylistic changes, are hereby adopted by the court:

1. This case involves the 1994 lieutenants' promotional test prepared for the Chicago Police Department.

2. Plaintiffs are 44 African-American or Latino present or former members of the Chicago Police Department who hold the career service rank of sergeant and participated in the 1994 lieutenant promotional examination.

3. Plaintiffs have not been promoted to the rank of police lieutenant based on the results of the 1994 Chicago police lieutenant examination.

4. On March 28, 1995, plaintiffs filed a complaint in this action challenging the 1994 Chicago police lieutenant examination process under 42 U.S.C. §1981 and 42 U.S.C. §1983. On December 5, 1995, plaintiffs filed their First Amended Complaint, adding a Title VII disparate impact claim. On February 9, 1996 plaintiffs abandoned their 1981 and 1983 claims.

5. Plaintiffs contend that the test has a disparate impact upon African-American and Hispanic police sergeants and is an unlawful employment practice under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e.

6. Plaintiffs do not claim that the City intentionally discriminated against plaintiffs or subjected them to disparate treatment.

7. Defendant City of Chicago concedes that the test had a disparate impact on African-American and Hispanic sergeants and contends that the test is job related and consistent with business necessity.

8. The 1994 lieutenants' test was taken by 765 police sergeants: 184 (or 24%) of those who took the test were African-American; 55 (or 7%) were Hispanic.

9. The City has made 108 promotions from the list. Six of those promotions (or slightly less than 6%) of those promotions have gone to minorities (5 of those promoted are African-American and 1 is Hispanic).

10. The parties agree that the statistical evidence makes out a prima facie case of disparate impact discrimination.

11. The 1994 promotional test consists of three subtests which shall be referred to in this order as follows: a written job knowledge test, an in-basket simulation, and an oral briefing exercise.

12. Scores on each component were combined to produce a final score.

13. Each component of the test had a disparate impact on minorities:

a. White sergeants received 193 of the top 207, 282 of the top 316, and 350 of the top 413 scores on the job knowledge test,

b. White sergeants received 181 of the top 203, 271 of the top 313, and 356 of the top 442 scores on the in-basket simulation.

c. White sergeants received 171 of the top 195, 303 of the top 383, and 412 of the top 540 scores on the oral briefing exercise.

d. White sergeants received 102 of the top 108 scores.

14. The parties agree that the statistical evidence makes out a prima facie case of disparate impact discrimination for each component of the 1994 lieutenant's test.

15. The CPD has promulgated a comprehensive set of departmental directives which establish CPD policy and procedure.

16. General Orders set forth CPD policy. A full set of the CPD General Orders that were in effect as of the date of the 1994 Chicago police lieutenant examination is contained in Defendant's Exhibit 7, which is in evidence.

17. Special Orders set forth CPD procedures. A full set of the CPD Special Orders that were in effect as of the date of the 1994 Chicago police lieutenant examination is contained in Defendant's Exhibit 8, which is in evidence.

18. Police actions are also governed by the criminal statutes of the State of Illinois and the City's Municipal Code.

19. All probationary officers are trained on the General Orders, Special Orders and Illinois criminal statutes upon hire.

20. There are four career service ranks in the CPD: police officer, sergeant, lieutenant and captain. Police officers are supervised by sergeants. Sergeants are supervised by lieutenants.

21. Lieutenants are promoted from the rank of sergeant.

22. At the time of trial, there were approximately 252 lieutenants in the CPD.

23. Prior to assuming the position of lieutenant, newly promoted lieutenants participate in a two-week pre-service training session. The training program exposes new lieutenants to management techniques, executive development issues and personnel issues.

24. The CPD is comprised of five bureaus: administrative, technical, staff services, operational services and investigative services. The operational services bureau is a field unit that includes the CPD Patrol Division.

25. The majority of newly promoted lieutenants are assigned to the Patrol Division.

26. District Law Enforcement, part of the CPD Patrol Division, is responsible for day-to-day law enforcement for the City of Chicago. It is comprised of 25 districts located throughout Chicago.

27. In each of the 25 districts, there is a district commander who is responsible for overall district operations.

28. Operations in each police district are divided into three hour shifts, called "watches." District operations during each watch are supervised by a "watch commander." The position of watch commander is held by an officer with the rank of lieutenant or captain.

Because the CPD is phasing out the rank of captain, the watch commander job is now performed more and more by lieutenants. There is no difference between what a captain does as a watch commander and what a lieutenant does as a watch commander.

29. As watch commander, the lieutenant is responsible for all activities that occur on a given shift in a district. These duties include overseeing the arrest, booking and bonding process. scheduling and assigning officers, conducting roll calls, inspecting personnel and equipment, conducting training, conducting facility inspections, supervising personnel assigned to district administrative activities, reviewing and approving all arrest reports and complaints, directing and reviewing disciplinary investigations of CPD personnel, monitoring the lockup, and personally responding to and assuming command at major criminal incidents occurring within the geographic confines of the district.

30. At the start of the shift, the watch commander meets with the watch commander from the previous shift to discuss any problems or issues that may be relevant to his or her tour of duty.

31. The watch commander reviews the commanding officer's book ("CO book") and any other paperwork or communications from the preceding watch commander, the district commander or any command member of the CPD to ascertain specific duties and responsibilities for his or her shift.

32. The watch commander inspects the district facility and the lockup facility to ensure the health and safety of all persons in CPD custody and to ensure compliance with applicable laws, rules and regulations. The watch commander also checks on the status of arrestee processing and the length of all detainments, and determines whether any prisoners remain who have yet to be released on bond.

33. The watch commander may review supervisor logs.

34. The watch commander may examine the manpower schedules. The watch commander is also responsible for adjusting work schedules in response to unanticipated

absences.

35. Manpower scheduling is governed by specific CPD directives and by the collective bargaining agreement between the City and the police union, the Fraternal Order of Police ("FOP") (the "FOP contract").

36. There are at least two roll calls during each shift. During roll call, the officer conducting roll call conducts an inspection of all personnel. Once a week, the officer conducting roll call conducts a weapons and ammunition inspection of all personnel. During roll call, officers and supervisors receive their assignments for the shift. The officer conducting roll call reviews the CO book and notifies officers of court appearances, special work assignments or other items of interest contained therein. The officer conducting roll call also periodically provides roll call training during which training bulletins, new General Orders and Special Orders are reviewed and discussed with subordinates.

37. The watch commander also attends to various administrative duties.

38. The watch commander is responsible for reviewing and signing off on all overtime requests and authorizations.

39. The watch commander has the responsibility to review time due slips.

40. The watchcommander conducts and/or oversees weapons discharge investigations concerning incidents in which a police officer has discharged his weapon or has been fired upon. The watch commander retains the responsibility for the investigation through any subsequent formal investigation if any person has been struck by a shot from an officer's weapon.

The watch commander is responsible for ensuring that the crime scene is protected, that proper notifications have

been made, that injured persons have received medical attention, that all weapons discharge reports have been prepared, and that proper disciplinary procedures are implemented.

41. If an officer is injured on duty, the watch commander is required to review the injury-on-duty report that is prepared by the investigating supervisor.

42. The watch commander reviews activity reports prepared by subordinate officers.

43. The watch commander reviews case reports prepared by subordinate officers.

44. The watch commander reviews and approves summary punishment action requests ("SPAR") for subordinate officers. The SPAR system is an expedited disciplinary process for less serious transgressions by officers (e.g., traffic accidents, tardiness, failure to appear in court).

45. The watch commander reviews complaint register ("CR") investigations. CR investigations are initiated when officers are alleged to have committed more serious transgressions (e.g., use of excessive force, verbal abuse, failure to provide service), and may result in discipline of the officers up to and including discharge.

46. The watch commander reviews arrest reports prepared by subordinate officers. Arrest reports are reviewed to ensure that they are complete, that charges are justified by the narratives provided by the officer, that there is probable cause to support the charges, that proper notifications have been made, and that arrestees who are eligible for bond are bonded out. Lieutenants must know the elements of crimes to make proper probable cause determinations.

47. The watch commander is responsible for ensuring that arrestee processing is done in compliance with CPD directives and orders.

48. The watch commander assigns officer counseling and other job duty assignments to sergeants.

49. The watch commander investigates incidents in which arrestees are hospitalized.

50. Throughout the shift, the watch commander monitors the activities in the district via the police radio. The watch commander is responsible for responding to and assuming command at major incidents (e.g., police shootings or hostage incidents).

51. The watch commander is required to tour the district periodically in a police vehicle to provide a command presence.

52. The watch commander supervises the personnel assigned to the district facilities, including all desk personnel, desk sergeants and watch secretaries.

53. The office facilities of watch commanders differ from district to district.

54. The watch commander's office is a focal point of many of the principal activities in the district. The watch commander's office is particularly busy at the change of shifts, when officers are getting their notifications.

55. While overall patrol operations for each district are supervised by a watch commander, field operations during each watch are supervised by field lieutenants. Field lieutenants directly supervise the sergeants in the field.

56. Field lieutenants are responsible for all field operations. They attend roll call, assist the watch commander in the inspection process and roll call training process, monitor, supervise and counsel sergeants and police officers, review forms and reports submitted by police officers and sergeants, ensure compliance with police policy and procedures while personally responding to major incidents in the field,

investigate actions of police officers, conduct investigations of licensed premises, ensure overall compliance with the FOP contract and supervise check off roll call.

57. After roll call, the field lieutenant goes out into the district in an assigned police vehicle and supervises all field activities during the shift. Police vehicles are rotated among lieutenants from shift to shift. At the end of a shift, the field lieutenant turns the vehicle over to the lieutenant on the next shift who, in turn, turns the vehicle over to the lieutenant for the next shift.

58. Field lieutenants conduct investigations of weapons discharge incidents. As part of the investigation of an incident, the field lieutenant prepares a preliminary information weapons discharge worksheet and a weapons discharge report documenting the incident and investigation, and, if an officer is injured, an injury-on-duty report.

59. Field lieutenants may recommend summary punishment action requests for subordinate officers. Such recommending lieutenants investigate and submit SPARs, and review and approve SPARs initiated by subordinates.

60. Field lieutenants conduct CR investigations when a sergeant is the offending officer, and review CR investigations conducted by sergeants regarding police officers. The investigation is a formal due process investigation in which the accused has right to counsel. The formal investigation involves consideration of prior disciplinary and complimentary history and penalty recommendations. The investigation file includes a "Complaint Against Department Member" form and an "Administrative Proceeding Rights" form (in a non-criminal matter).

61. Field lieutenants conduct or ensure thorough investigations of licensed premises (e.g., taverns or other liquor establishments in which incidents occur).

62. Field lieutenants also respond to calls for police service. Lieutenants respond to the scene of major incidents (e.g., homicide) and are responsible to coordinate police activity at the scene, to ensure that proper notifications have been made, to ensure preservation of the crime scene, to ensure safety and health of all individuals involved and to provide necessary information to supervise officers.

63. Lieutenants ensure that complete investigations are conducted regarding CPD members who are suspected of intoxication and drug use.

64. Lieutenants review reports prepared by police officers and sergeants including, but not limited to, arrest reports, case reports, injury-on-duty reports, activity reports, information reports and time due slips.

65. Lieutenants review search warrants, complaints for search warrants, and search warrant data forms to determine whether there is sufficient probable cause to justify the warrant, to ensure that the warrant is accurate, complete, signed and properly planned, and to ensure that proper notifications have been made and that the warrant has been submitted to the State's Attorney's office and the court.

66. The field lieutenant does not have an office. Field lieutenants work out of the police car assigned to them for a particular shift.

67. Starting in 1992, the CPD developed and implemented a new policing strategy known as the Chicago Alternative Policing Strategy, or CAPS. The CAPS style of policing represented a departure from the CPD's incident-driven policing method, which focused on responding to service calls. The CAPS style relies upon a relationship between the CPD and members of the community to identify and solve problems in the community.

68. Under CAPS, police officers meet with community members to discuss problems of crime and disorder, prioritize the problems and develop strategies for addressing the problems. Based on these meetings, officers develop beat plans that chronicle specific criminal problems and strategies for response.

69. All 44 plaintiffs completed all three components of the 1994 Lieutenant examination. Their scores on each of the three components (the higher the number the better the score on each component) and their overall examination performance in relation to the 765 individuals who completed all three components of the examination (1 is the top scorer and 765 is lowest scorer) are as follows:

Name	*written*	*oral*	*in-basket*	*final rank*
Brown, Ernest T	95	11	49	541
Bryant, Lloyd E	92	8	35	750
Butler, Desmond J	87	12	43	616
Byrd, Doris M	106	13	47	354
Carpenter, Reginald	57	13	37	719
Cole, Louis C	112	11	46	461
Crump, Henry E	96	12	33	670
Davis, Theodore R	105	7	35	740
Day, Sandra K	107	12	46	429
Eaglin, Paul R	90	8	38	740
Grayer, Mary A	106	15	44	258
Hardy, Judge F	111	14	35	448
Hargrove, Larry	112	11	48	429
Harper, Juana J	97	14	51	282
Harris, Samuel E	89	12	44	587
Hicks, Eddie C	95	12	45	535
Jackson, Prentiss E	101	13	47	398
James, William M	92	12	36	662
Johnson, Forest L	89	9	35	735
Kimber, Vance T	99	12	47	475
Lewis Jr, Chris	112	9	44	611
Love, Robert A	113	12	36	543
Mastin, Barry	112	13	45	330
Mc Caster, Maurice L	107	10	38	657
Mial, Paul D	75	11	31	749
Moran Jr, Reyes P	82	13	31	699
Morgan, Cheriff A	82	13	44	576
Porter, Bernard	82	11	47	649
Raymond, Alberta M	118	13	44	298
Robinson, Holly C	117	10	56	316
Robinson, Yvonne	101	11	50	481
Rowland, Cisco D	110	11	45	489
Russell, Kevin	102	14	46	321
Shead, Brenda J	110	12	46	413
Shepherd, Eugene N	106	11	31	679
Silas, Nathan E	115	12	46	375
Steward, Dorothy M	102	13	36	602
Steward, Morris L	107	13	36	521

Thompson, Diane D	121	13	41	325
Tyler, Calvin E	97	12	36	642
Washington, Earl B	92	12	44	567
West, Gertrude	99	10	40	670
Wilindez, Joaquin	112	11	52	370
Woods, Wanda R	93	9	43	697

V. ADDITIONAL FINDINGS AND CONCLUSIONS REGARDING TEST VALIDITY

V.A Development, Design and Administration of the 1994 Chicago Police Lieutenant Examination

The 1994 Chicago Police Lieutenant Examination was developed by Barrett & Associates,[1] a human resources consulting firm specializing in employee selection, hiring and promotional testing. Barrett & Associates is headed by Dr. Gerald B. Barrett, who has a PhD in Psychology and a law degree, and who teaches courses in testing and measurement, personnel selection and performance evaluation, and personnel psychology and the law at the University of Akron. Dr. Barrett's curricula vitae was admitted into evidence as Defendant's Exhibit 2. Founded in 1973, Barrett & Associates has custom-developed more than 50 examinations for municipal police and fire departments. The court found Dr. Barrett to be a highly knowledgeable, qualified and credible witness.

Prior to developing the 1994 lieutenant examination, in 1993 Barrett & Associates developed a promotional examination for the position of Chicago police sergeant. In

1. The City retained Barrett & Associates to conform with the recommendation of a "blue ribbon panel" appointed by Mayor Richard M. Daley in 1990, that the City use outside consultants to design and administer police promotional examinations.

developing the 1993 sergeant examination, Barrett & Associates conducted a job analysis of the sergeant position. In that job analysis, Barrett & Associates interviewed approximately 90 incumbent sergeants about their duties and responsibilities in the CPD. Barrett & Associates also interviewed 28 lieutenants as part of the sergeant job analysis. In conjunction with subject matter experts from the CPD, Barrett & Associates developed a three-part sergeant examination comprised of a written job knowledge test, an in-basket simulation and an oral briefing exercise, the same format used for the 1994 lieutenant examination.

Barrett & Associates' "Report on the Development and Administration of a Promotion Process for the Job of Chicago Police Lieutenant" (received in evidence as Defendant's Exhibit 1) describes the actions taken to develop the examination. This description conforms to the testimony and other evidence, and will not be repeated in detail here. To summarize, Barrett & Associates conducted a job analysis to identify the major work behaviors and related knowledge, skills and abilities ("KSAs") for the job of Chicago police lieutenant by conducting extensive interviews with a broad spectrum of Chicago Police Department personnel (including diverse ranks and minority members), personal observation of the job and a review of all relevant departmental and organizational documents. Barrett & Associates personnel interacted and consulted with Chicago Police Department personnel to identify the major work behaviors and the materials that a Chicago police lieutenant must know to do his or her job. These materials include Chicago Police Department General and Special Orders, portions of the Illinois Criminal Code and Chicago Municipal Code, the FOP collective bargaining agreement, and a document describing the Chicago Police Department's Community Policing strategy ("CAPs").

In addition, Barrett & Associates used four Chicago Police Department subject matter experts[2] to review, comment on and criticize its work as it progressed. In addition to developing the test itself, this process resulted in the development and production of a Master Job Description (Def. Ex. 1, Appendix C) and, two weeks prior to the giving of the written test, a reading list for applicants to study (Def. Ex. 20). The court finds that the job analysis conducted by Barrett & Associates conformed to the standards of industrial psychology presented at the trial, as well as the EEOC Guidelines.

The evidence presented by the City demonstrated the following facts concerning the three components of the police lieutenant examination, which were designed to tap different elements of the job. The oral briefing exercise was utilized to measure the oral communication skills required on the job by lieutenants. The written job knowledge examination was utilized to measure the job knowledge required to perform the major work behaviors of the lieutenant job. The in-basket simulation was utilized to measure the administrative and organizational component of the job.

There were 1101 candidates eligible to take the test. The oral briefing exercise was administered to 915 candidates on June 1, 1994. Of the 915 candidates who participated in the oral briefing exercise, 765 chose to continue and complete the entire test battery. The written job knowledge test and in-basket simulation were administered to the 765 candidates on November 19, 1994.

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2. These were Chief of Patrol John Cadogan and Lieutenant John Klein, who are white, Deputy Chief William Shaw, who is African-American, and Commander Joseph DeLopez, who is Hispanic.

V.B Oral Briefing Exercise

The oral briefing exercise was designed to measure those job dimensions identified during the job analysis as vital to successful performance as a Chicago police lieutenant, such as analytical ability and organizational and oral communication skills. The exercise was designed to simulate a situation that could be encountered on the job by a Chicago police lieutenant. The candidate was to review information about a given problem (a new gang) and was directed to brief his or her subordinates on the problem. Each candidate was given explicit directions as to what type of oral briefing they were required to present. In the briefing package, each candidate was given 13 pages of police reports, Special Orders, and other materials in the same format as used by the CPD. The candidate was allotted twenty-five (25) minutes to review the materials and to prepare the presentation. After this preparation, the candidate was allowed a maximum of ten (10) minutes to present his or her briefing into three tape recorders.

The exercise utilized tape recorders, rather than live raters, allowing for the assessment of all eligible candidates in one day. Completing all testing in one day provided for the security of the assessment materials and ensured fairness of the assessment process. Exercise materials remained confidential and, thus, did not afford an unfair advantage to candidates who may have completed the exercise at a later time.

Tape recording also allowed the raters an opportunity to replay tapes if necessary. This increased the reliability of the scoring procedure. The use of tapes also allowed for blind rating, i.e., the raters did not know the identity, or the race, of the individuals they were rating. This minimized potentialbias in the rating process.

Each candidate's presentation was rated in terms of characteristics including analysis, organization and oral

communication by three trained raters, who scored the briefing according to an objective checklist. Def. Ex. 1, p. 107. All raters received diversity training. The raters also received specific training on how to rate the briefing tapes. The raters were trained on specific rating procedures and were provided practice in the application of the rating factors developed for each scoring dimension. In the training program, common rating errors were reviewed, as were strategies for avoiding errors. Each rater scored the exercises independently of the other raters. Then the three raters compared their ratings and any discrepancies were resolved.

The raters reached consensus on one set of ratings for each candidate. If it was necessary in order to reach a consensus, the tapes could be played again for further review.

Chief Cadogan and Lt. Klein, subject matter experts from the CPD, reviewed the oral briefing exercise before it was administered. Chief Cadogan and Lt. Klein also reviewed the scoring checklists of important and relevant information to be utilized in rating the exercise. These subject matter experts evaluated the oral briefing exercise to ensure that it was fair, that it reduced the possibility of rater bias or favoritism, and that a sufficient amount of time was allotted for the completion of the exercise. The decision regarding the actual time allotted for the oral exercise was based on the past experience of Dr. Barrett and the feedback provided by the subject matter experts. The time allotted to candidates for review of the briefing materials in the exercise was longer than the time usually available to lieutenants before making such presentations on the job. The subject matter experts reviewed the oral exercise to ensure that it simulated subject matter and responsibilities that lieutenants encounter on the job. The subject matter experts made recommendations regarding the subject matter and format of the oral briefing exercise. Barrett & Associates made revisions to the oral briefing exercise based on their

recommendations. Chief Cadogan and Lt. Klein determined that the types of skills required to respond to the oral component are the types of skills required for the job of lieutenant.

Prior to the actual use of the oral briefing exercise, Barrett & Associates pilot-tested the exercise by administering it to 29 graduate students. Because of confidentiality concerns, the pilot test could not be given to anyone who had contact with the City of Chicago or the CPD. The pilot test exercises were scored by trained raters at Barrett & Associates, the same raters who were used to rate the actual examination. The pilot test was conducted to ensure that Barrett & Associates' test administration procedures were not flawed and to determine the reliability of the rating process.

The oral briefing exercise was linked to the major work behaviors and responsibilities of a lieutenant, and to the KSAs set forth in the Master Job Description. A linkage chart documenting the linkage between testing dimension (e.g., analysis), the definition of the dimension, the specific ability being tapped, the related major work behaviors and the rationale was prepared by Barrett & Associates and is included in the Technical Report (Def. Ex. 1) at Appendix H. Every element of the oral briefing exercise was linked to major work behaviors and KSAs identified in the job analysis.

V.C Written Job Knowledge Test

The written job knowledge component was a 150 question multiple-choice examination designed to test a candidate's knowledge of specific CPD General Orders, Special Orders, the Illinois Compiled Statutes, Chicago Municipal Ordinance, the FOP contract and the CAPS strategy. CPD lieutenants must know the General Orders, Special Orders, Illinois statutory law, the Municipal Code, FOP Contract and CAPS strategy to effectively perform the job of police lieutenant. The job knowledge test was designed to test the

domain of job knowledge contained on the reading list.

Candidates were given two and one-half hours to complete the written job knowledge test. The multiple-choice format was selected to eliminate any grading bias. Candidates were instructed to select the one best answer to each question. The items on the written job knowledge component were drafted by members of the Barrett & Associates staff who had been trained previously in industrial psychology, item writing, and diversity. The test items were derived from the source materials and drafted so that the item stems (the questions themselves) reflected actual events encountered by lieutenants on the job, as indicated by the job analysis. The items on the written job knowledge test were written to sample the knowledge in the source materials identified during the job analysis as important for a lieutenant to know. The item writers relied on job analysis information to determine the number of questions to be included from various sources. The items on the written job knowledge component were designed to measure only the KSAs required for successful performance on the job as determined by the job analysis. Def. Ex. 1, p. 112. Each item on the written job knowledge test was explicitly linked to the major work behaviors and tasks identified in the Master Job Description. Each item on the written job knowledge test was linked to knowledge identified as important to successful performance on the job.

Barrett & Associates prepared a linkage chart which illustrates the linkage between the test items and the major work behaviors identified in the Master Job Description. A copy of the linkage chart is included in the Technical Report at (Def. Ex. 1) Appendix K. Appendix K demonstrates that each item on the written job knowledge examination tests for knowledge required for the job of lieutenant. The more important major work behaviors, as identified in the job analysis, were linked to a greater number of test questions.

That is, more questions were included on the test to test the job knowledge of candidates regarding the more important major work behaviors.

Test items were written at a reading level that is lower than the reading level required to read the actual source materials on the job. Each item used on the written job knowledge test, including the stem and the five possible alternative answers, was reviewed by several item writers at Barrett & Associates, by the four subject matter experts from the CPD and by Dr. Barrett. Each item was reviewed against the original source documentation by the item writers and project supervisors from Barrett & Associates.

The written job knowledge examination was pilot tested. Ten graduate students took a sample test of 186 questions at Barrett & Associates' offices in Ohio. To ensure confidentiality and test security, each test taker signed a confidentiality agreement and the test was closely monitored in a secured room. Barrett & Associates used the results of the pilot test to eliminate inconsistencies and errors, and to refine the test items. Barrett & Associates also used the results of the pilot test to determine that the time allotted for the completion of the written job knowledge test was appropriate.

In order to ensure the relevance and accuracy of the questions on the written job knowledge component, each of the 150 written test questions, and several other potential test questions, were reviewed by CPD subject matter experts. The subject matter experts broke into groups, with each group teaming with a Barrett & Associates employee, and reviewed the stem and alternatives of hundreds of potential questions. The subject matter experts reviewed the test items to ensure that the items were derived from the source materials on the reading list published to candidates. The subject matter experts confirmed that the items on the written job

knowledge test were derived from and related to the materials on the reading list. The subject matter experts reviewed the time allotted for the written job knowledge test to ensure that it was appropriate. The subject matter experts also reviewed the test items to ensure that the items utilized understandable language consistent with the language in the CPD directives, and to ensure they were related to the duties and responsibilities of a CPD lieutenant. The subject matter experts reviewed the alternative answers proposed for each test question to ensure there were no obviously implausible answers, to ensure that alternatives were accurate and to ensure that out of the five possible answers, two alternatives could not be correctly construed as the best answer. The subject matter experts recommended additions, deletions and modifications of several of the potential test items they reviewed. Barrett added, deleted or modified test items based on feedback from these CPD subject matter experts. The subject matter experts reviewed the universe of modified and updated test items a second time.

The analysis conducted by Barrett & Associates and the subject matter experts on every test item on the written job knowledge test, as well as those created but not used on the test, was documented by Barrett & Associates. A representative analysis is attached to the Technical Report at (Def. Ex. 1) Appendix L. Each item analysis documented the test item, the five possible multiple-choice answers, the correct answer, the source of the knowledge being tapped by the item, a rationale describing the major work behaviors being tapped by the item, a written justification for each multiple-choice answer indicating why the answer is right or wrong, the comments of the Barrett & Associates employees and subject matter experts who reviewed the items, the dates on which the items were reviewed, and the date and results of the pilot test of the item. The item analyzed in Appendix L was not used on the examination because it overlapped with another

item. After the test questions were modified to comport with their recommendations, the CPD subject matter experts found that the written job knowledge test was related to the job of police lieutenant and that it tested knowledge that is important for a lieutenant to have.

The written job knowledge test tested for knowledge that a lieutenant must know in order to be effective on the job. The written job knowledge test was independently computer scored by Barrett & Associates and by Arthur Andersen. The scoring by Barrett & Associates and Arthur Andersen was compared and found to be identical.

V.D In-basket Simulation

The in-basket simulation presented the candidates with a packet of information that included identical copies, or close approximations of documents and other items that a Chicago police lieutenant might come across on the job, e.g., General Orders, directives, memos, and reports. The in-basket simulation required candidates to perform several tasks that are actually performed by Chicago police lieutenants on the job, such as reviewing reports, investigating and disciplining subordinates and assigning tasks.

The in-basket exercise is a simulation of the lieutenant job; it is not intended to be an exact replica of the job. As a test, the simulation compressed several days or months of work into a short testing period to measure a candidate's administrative ability. The in-basket simulation required the candidates to step in and assume the duties and uncompleted tasks (e.g., review arrest reports) of a lieutenant who has become ill and incapacitated. This exercise closely simulated events that occur at the CPD; when lieutenants are unable to complete their work due to illness, reassignment or some other reason, other lieutenants are assigned to complete their unfinished work. Barrett & Associates prepared the in-basket simulation based on information collected from incumbent lieutenants regarding important issues and occurrences

encountered in the performance of their work duties. Incumbents provided examples of actual situations that occurred on the job and offered a step-by-step explanation of how the situation was identified, specific actions taken, reasons for actions, how the situation was resolved, and procedures for documenting the incident.

Each candidate was given two hours and thirty minutes to review the set of materials and to take notes on those materials and the decisions they made regarding the issues presented in the materials. The candidate was then given 90 minutes to complete 60 multiple-choice questions based on the factual scenarios provided in the materials. The answer to each item in the in-basket simulation was contained in the accompanying in-basket materials. Candidates were allowed to refer to the materials and their notes while they were completing the multiple-choice questions. Simulation materials and questions were written at a reading level that is lower than the reading level required to read the actual forms and source materials on the job.

An objective, multiple-choice format was utilized in the in-basket simulation to eliminate grading bias and, thus, to increase test reliability. The research and literature in the field supports the use of a structured testing format such as the multiple-choice format used in the in-basket simulation. The use of a multiple-choice format increases the reliability of the simulation because it eliminates rater error and subjectivity. The use of a multiple-choice format does not diminish the validity of the in-basket simulation.

Dr. Barrett considered using live raters in the in-basket simulation rather than an objective multiple choice format. Dr. Barrett elected not to use that approach-referred to as "traditional in-basket exercise" by Dr. York-because that subjective approach is more often used as a teaching or developmental method, rather than as a selection method, to

observe, critique and provide feedback to managers on their style of management.

The in-basket simulation was pilot tested. Graduate students participated in the simulation in a confidential and secure setting.

Based on the results of the pilot test, the in-basket simulation was modified and fine-tuned. The materials and facts in the in-basket simulation were checked against the actual CPD documents to ensure that they did not contradict actual procedures of the CPD. CPD subject matter experts Cadogan, Klein, DeLopez and Shaw reviewed the in-basket component to ensure relevance and accuracy and to ensure that the materials used were consistent with the type of materials a lieutenant would confront on the job. Def. Ex. 1, p. 120. As with the written job knowledge test, the CPD subject matter experts broke into groups, teamed with Barrett & Associates employees, and reviewed the questions and materials from the in-basket simulation. The subject matter experts reviewed the items in the in-basket simulation to ensure that the items were derived from the source materials on the reading list published to candidates. The subject matter experts reviewed the test items to ensure that the items used understandable language consistent with the language in the CPD directives. The subject matter experts recommended additions to or deletions from the potential in-basket items and materials, which were incorporated by Barrett & Associates. After the recommended modifications were made, the subject matter experts reviewed the in-basket simulation a second time. The subject matter experts also reviewed the time allotted for the completion of the in-basket simulation. Based on their recommendations, the time allotted was increased and the complexity of the tested material was decreased. The subject matter experts found the in-basket component, as modified to reflect their recommendations, complete and appropriate. The subject matter experts

found that the in-basket materials were very similar to the materials that a lieutenant would review in the course of his or her duties.

The in-basket simulation tested for knowledge, skills and abilities that a lieutenant must possess to be effective on the job. All items in the in-basket simulation were linked to major work behaviors and KSAs in the Master Job Description. A linkage chart documenting the testing dimension (e.g., application of rules and procedures), the definition of the dimension, the rationale, the related major work behaviors and the specific tasks in the simulation was prepared by Barrett & Associates and is included in the Technical Report (Def. Ex. 1) at Appendix N. The in-basket simulation was independently computer scored by Barrett & Associates and by Arthur Andersen. The scoring by Barrett & Associates and Arthur Andersen was compared and found to be identical. In order to maintain the confidentiality of the examination, candidates were not allowed to take copies of the test materials, answer sheets or notes out of the testing facility.

V.E Conclusion: The 1994 Chicago Police Lieutenant Examination Is Content Valid

The court finds that the 1994 lieutenant examination, including each of its three components, is content valid because it measures a significant portion of the knowledge, skill and abilities of a Chicago police lieutenant. By utilizing three distinct types of testing procedure, the examination both approximated actual work behavior (the in-basket and oral briefing exercises) and tested objective knowledge that a police lieutenant must have to do his or her job. The City presented highly convincing evidence that the use of the multiple choice format for the in-basket and written knowledge components, and the equal weighting of each component, were valid methods.

All parties to this action agree on one thing: it was extremely unfortunate—and unintended—that minorities scored so poorly on the examination. As the City points out, however, the examination should not be judged content invalid based on the result that some qualified applicants did not get promoted. That inquiry is applicable to the criterion related method rather than the content related method of proving validity. *Gillespie,* 771 F.2d at 1040, n. 3.

The record in this case is clear that both the City and Barrett & Associates took extensive measures to avoid any kind of racial or ethnic bias in the development, administration and scoring of the examination. They identified and tested the applicants for the knowledge, skills and abilities needed to be a Chicago police lieutenant. Promotions were made in rank order to fill vacancies in the rank of lieutenant, a procedure that Dr. Barrett convincingly defended and that is approved by the EEOC Guidelines and industry standards in connection with a content valid test.

The City more than met its burden of proof of content validity, and plaintiffs failed to present convincing evidence to the contrary. Instead, plaintiffs identified certain test questions that were arguably graded improperly, certain conditions in taking a portion of the examination that were less than ideal, and certain flaws in the challenge procedures. In the context of the entire 1994 Chicago Police Lieutenant Examination, however, these imperfections were de minimus.

Plaintiffs also attack a number of individual questions in the written knowledge and in-basket portions, claiming that some of them did not test job knowledge that a lieutenant needed to know his first day on the job, that a lieutenant could easily look up the proper answers from relevant source materials on the job, and that the answers to certain other questions were incorrect. The court has reviewed these questions and the evidence concerning them, and finds that they

did in fact test job knowledge required of a police lieutenant, that it would be impractical for a lieutenant to carry around with him or her all of the source materials needed to answer the various questions, and that the answers considered correct by Barrett & Associates were in fact correct.

VI. AVAILABILITY OF AN EQUALLY VALID LESS DISCRIMINATORY ALTERNATIVE

Having determined that the 1994 lieutenant's examination was valid, the burden shifts to plaintiff to establish that there was an available, equally valid, less discriminatory method for promotion that the City refused to use.

As the City acknowledges, once it received the test scores and determined that an adverse impact occurred, it was required to consider any equally valid, less discriminatory selection method that was available to ameliorate the disparate impact. 29 C.F.R. §1607.3(B). The City found one alternative, using merit promotions in conjunction with the examination to promote 13 sergeants (minorities and non-minorities) to the rank of lieutenant (in addition to the 54 promotions that had at that time been made based on the examination) based on job related criteria. A panel comprised of CPD deputy superintendents and the commander of the training division reviewed nominations from CPD exempt rank personnel and recommended to the Superintendent who should be promoted.

The City's decision to promote 13 sergeant by merit selection resulted in a state court challenge by a non-minority candidate. That action, filed in the Circuit Court of Cook County on March 20, 1995 (eight days before the instant case was filed in this court on March 28, 1995), was based on provisions of the Chicago Municipal Code, which the plaintiff argued did not give the Commissioner of Police the power to use merit selection. The state court held a preliminary injunction hearing, at which the City sought to introduce evidence of the federal guidelines concerning

employment examinations with an adverse impact. The plaintiff objected, and the judge prohibited any testimony on the subject, (although he did accept an offer of proof).

On March 29, 1995, the Circuit Court preliminarily enjoined the City from using any method of selection other than test rank order. The City appealed, arguing, among other things, that merit selection was necessary to alleviate the disparate impact of the 1994 examination. While the appeal was pending, the City was served with the complaint in the instant lawsuit, which it answered on May 30, 1995. On December 22, 1995, the Illinois Appellate Court, while praising the City's motives and without addressing the requirements of federal law, affirmed the injunction, holding that the City did not have the authority under state law to use merit selection. *McArdle v. Rodriguez,* 277 Ill.App.3d 365, 213 Ill.Dec. 709, 659 N.E.2d 1356 (1st Dist. 1995).

As a result, although the City recognizes that the use of merit selection in conjunction with the examination was an equally valid, less discriminatory method, it maintains that the method was unavailable to it because of the injunction. It argues that Title VII does not authorize it to ignore a facially neutral, nondiscriminatory state law or a state court order enforcing that law. Plaintiffs agree that the use of the City's merit selection program in conjunction with the rank order promotions based on the 1994 examination is an equally valid, less discriminatory method of promotion.

This court disagrees with the City's position. Title VII contains a provision expressly preempting conflicting state law. 42 U.S.C. s 2000e-7 provides: Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a state, other than any such law which purports to require or permit the doing of any act which would be an unlawful

employment practice under this subchapter.

In the instant case, accepting as correct the state court's application of the Municipal Code, the resulting holding "requires" the City to violate Title VII. By passing the Civil Rights Act of 1964, and Section 2000e-7 in particular, Congress "intended to supercede all provisions of State law which require or permit the performance of an act which can be determined to constitute an unlawful employment practice under the terms of Title VII of the Act or are inconsistent with any of its purposes." *Rinehart v. Westinghouse Elec. Corp.*, 1971 WL 174 (N.D.Ohio 1971). Under 29 C.F.R. §1607.3(B), the City was required to use any available alternate selection procedure to ameliorate the adverse impact of the otherwise content valid test. The City knew that, and attempted to so argue to the state court. When the Illinois Appellate Court rejected the City's argument and upheld the injunction without considering the resulting violation of federal law, it interpreted an otherwise facially neutral Municipal Code provision in a manner inconsistent with the terms of Title VII. That interpretation was unconstitutional under the Supremacy Clause of the United States Constitution. Id. As held in *Guardians Association v. Civil Service Commission*, 630 F.2d 79, 104-105 (2d Cir. 1980), "Title VII explicitly relieves employers from any duty to observe a state hiring provision which purports to require or permit any discriminatory employment practice."

The City argues that once the injunction was affirmed, it was in a "damned if you do, damned if you don't" situation. It chose "don't," electing to argue to this court that the injunction proves that merit selection was unavailable. As held by the Seventh Circuit almost a quarter century ago, however, "the scheme of Title VII provides that employers are exempted from liability under state laws which require the doing of acts which constitute unlawful employment practices, not that reliance on state statutes resulting in

discriminatory practices bars Title VII liability." *Williams v. General Foods Corp.*, 492 F.2d 399, 404 (7th Cir. 1974) (citations omitted).

Moreover, that untenable situation was entirely of the City's own making. As noted, the City was aware of its obligations under 29 C.F.R. §1607.3(B) and that Title VII supercedes conflicting state law. It knew that it had an obligation to take whatever steps were necessary to implement the equally valid less discriminatory selection method. Therefore, once the state courts elected for whatever reason not to reach the issue, the City should have filed in the instant case either a counterclaim for a declaration that Title VII supercedes the Municipal Code, or (preferably) a third party claim against McArdle, bringing the issue and all parties squarely before this court to determine the City's obligations under federal law.

The City argues in a footnote that it could not have filed a declaratory judgment action prior to the initiation of any lawsuit claiming the results of the 1994 examination violated Title VII because no case or controversy existed, leaving the federal court without declaratory jurisdiction. This argument is to no avail because plaintiffs had already amended their complaint to include a Title VII claim prior to December 22, 1995, when the Illinois Appellate Court affirmed the preliminary injunction. Thus, an actual case or controversy existed at that time, which coincidentally, is the same date that the City filed its answer to the amended complaint. Therefore, once the injunction was affirmed, the City could have and should have brought the issue to this court, either as an affirmative defense or as a counter or third party claim for declaratory relief. It did neither, electing instead to ignore an equally valid less discriminatory selection method, thereby abrogating its obligations under 29 C.F.R. §1607.3(B).

VII. RELIEF

Having determined that the 1994 lieutenant's examination was valid but that the City had available an equally valid less discriminatory method of promotion by combining rank order promotions with merit selection, the court must determine the relief, if any, to which these 44 plaintiffs are entitled. Unfortunately, the record is unclear in this regard.

The court is uncertain whether any of these 44 plaintiffs were among those selected for merit promotions or whether any of them have a cognizable argument that they were likely to have been so promoted. Accordingly, the parties are directed to address this issue on July 10, 1998, at 11:00 a.m.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERNEST T. BROWN, LLOYD E. BRYANT, et al.

Plaintiffs,

No. 95 C 1890 *v.*

CITY OF CHICAGO,

Defendant.

MEMORANDUM OPINION AND ORDER

GETTLEMAN, District Judge.

On June 30, 1998, after trial on the issue of liability prosecuted by 44 minority sergeants who took the 1994 Chicago police lieutenant promotion examination (which the parties agree had an adverse impact on minorities), this court ruled that that examination was content valid, but that defendant City of Chicago violated Title VII of the Civil Rights Act, 42 U.S.C. §2000e, et. seq., by failing to utilize an equally available, less discriminatory method under which 20% of lieutenant promotions would be based on merit rather than rank order test scores. *See Brown v. City of Chicago,* 8 F.Supp.2d 1095 (N.D.Ill. 1998). In determining the appropriate remedy consistent with this holding, the court has had to confront the difficulties created by the fact that this case was not brought as a class action, and that only one of the named plaintiffs was among the 13 sergeants selected by merit from the group who took the 1994 examination.

The parties have taken extreme positions on this issue. Plaintiffs' counsel has argued that the court should, in effect, fashion a remedy as if a class of all minority candidates had been certified (a position the court has previously rejected)

and, further, that the court should award relief to all named plaintiffs regardless of whether they had been or were likely to have been chosen for merit promotions. The City has argued that only the single named plaintiff who had been among the 13 sergeants chosen for merit selection from the 1994 list, Sergeant Roberta Raymond, should be awarded anything.[1] In addition, Peter Dignan, Joseph Antonio, Thomas Keane, James Carroll, and Donald Kuchar (the "Dignan Intervenors"), non-minority sergeants who had been among the 13 chosen from the 1994 list, have petitioned the court to intervene as plaintiffs.

Although only Sergeant Raymond is a named plaintiff in this case, Title VII clearly allows the court discretion to order broader equitable and affirmative relief than that advocated by the City. 42 U.S.C. §2000e-5(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice,

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1. The City also acknowledges that the remaining 43 plaintiffs "may be entitled to some compensation" for the lost opportunity to be considered for merit selection in the second round of lieutenant promotions from the 1994 list, which occurred in March 1996. At that time, as in 1995, 54 sergeants were promoted, and 13 additional sergeants would have been promoted by merit. The mathematical likelihood of receiving a merit promotion in 1996 would therefore have been 13/794 (1.64%). The 794 figure is computed by deducting the 108 sergeants promoted by exam scores and the 13 original merit promotees from the 915 sergeants who took at least one component of the 1994 exam.

> and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate.

"Intentional" conduct in this context, means that "the practice was followed deliberately, not accidentally." *Roe v. Cheyenne Mountain Conference Resort,* 124 F.3d 1221, 1230 (10th Cir. 1997). As discussed in the court's previous opinion, the City's decision to not utilize the merit selection plan that both the City and plaintiffs agree was an equally available, less discriminatory method of promotion, was intentional. Accordingly, this court has the discretion to award relief to employees other than the named plaintiffs. The issue presently before the court is how best to exercise that discretion.

The court agrees with plaintiffs that it should be guided by the principle that the purpose of Title VII is "to make the victims of unlawful discrimination whole by restoring them so far as possible ... to a position where they would have been were it not for the unlawful discrimination," *Ford Motor Co. v. EEOC,* 458 U.S. 219, 230 (1982), and that in doing so the court should attempt "to recreate the conditions and relationships that would have existed if the unlawful discrimination had not occurred." *United States v. City of Chicago,* 853 F.2d 572, 575 (7th Cir. 1988).

It is clear to this court that the failure by the City to utilize the merit selection plan in place for the 1994 examination directly injured the 13 sergeants, minority and non-minority, who were actually chosen for promotion from that list but not promoted in 1995 as a result of the City's intentional conduct. The City complains that such promotion of the 13 sergeants at this time (and indeed any promotions from the 1994 list at this time) would be disruptive to its current program of promoting 30% of lieutenants by merit

selection, and further, that some of the sergeants who were among the original 13 are no longer eligible.[2]

While the court respects the City's efforts to maintain morale and to run an orderly promotional process, those considerations do not outweigh the remedy that this court considers necessary to correct the intentional conduct that it has found violated Title VII with respect to the original 13 sergeants who had been chosen for merit promotion. The court notes that these sergeants had completed training as lieutenants and were scheduled to be promoted when the *McArdle* injunction was issued. (For details involving this episode, *see Brown,* 8 F.Supp.2d 1095, 1110-12.) They should now be made whole.[3]

Accordingly, the petition of the Dignan Intervenors to intervene is granted, and the court hereby orders the City to promote with all deliberate speed the 13 sergeants chosen for merit promotion in 1995 to the rank of lieutenant, and to award them back pay consisting of the differential between their sergeant's pay and their lieutenant's pay, dating back to April 1995 when they had been scheduled to be promoted.

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2. Specifically, the City claims that one of the 12 remaining candidates is the subject of termination proceedings based on the Chicago Police Department's determination that that sergeant fraudulently altered police department weapons records.

3. Presumably, the disciplinary proceedings can continue against the individual charged with concealment of records, regardless of whether such person is a sergeant or a lieutenant. If, in the City's view, any other of the original 13 merit candidates are currently ineligible for promotion to lieutenant (e.g. through retirement, death or disability), the City should so notify the court forthwith.

With respect to additional promotions beyond the 13, however, the court finds the City's arguments persuasive. Significantly, the criteria and procedures put into place for merit promotions from the 1994 list were abbreviated and, as the parties agree, inferior to the current merit selection procedures by which the City intends to promote 30% (not 20%) of lieutenants by merit selection. There simply is no way for this court or the City to "recreate the conditions and relationships that would have existed if the unlawful discrimination had not occurred" in 1994 and 1995. *United States v. City of Chicago, supra,* 853 F.2d at 575. The City has persuaded this court that it would be impossible and disruptive to "clone" sergeants who took the 1994 examination into the group who took the 1998 examination and are thus eligible for merit promotion at this time. Other than the 13 sergeants who had been chosen for the 1994 list, no other candidates were identified for merit promotion. To attempt now to identify sergeants who were deserving of merit promotion three years ago would be conjectural and overly subjective.

To order further merit promotions from the 1994 list would therefore require an artificial exercise under hypothetical conditions that would not significantly alter the racial composition of the corps of Chicago police lieutenants. Judging from the evidence presented at trial and thereafter, the court is convinced that the City is doing all it can (with the exception of the disputed issues herein) to promote racial and ethnic diversity among the ranks of its lieutenants.

Accordingly, in balancing the equities and fashioning a remedy for the discrimination held by this court to have resulted from the City's decision not to use merit promotion in connection with the 1994 examination, the court declines to award further relief than that which is discussed above with respect to the 13 sergeants.

The City is directed to prepare and file a list of the 13 sergeants to be promoted as stated above, along with

calculations of back pay for each of them, on or before September 25, 1998. At the hearing scheduled for October 1, 1998, the parties will be expected to address the issue discussed in footnote 1 above.